Constitutional

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CONSTITUTIONAL HISTORY OF THE UNITED STATES

AS SEEN IN

THE DEVELOPMENT OF AMERICAN LAW

A COURSE OF LECTURES BEFORE THE POLITICAL SCIENCE ASSOCIATION OF THE UNIVERSITY OF MICHIGAN

BY

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INTRODUCTION.

THE following lectures on constitutional law were delivered under the auspices of the Political Science Association of the University of Michigan, in the months of March and April, 1889. The thought occurred to Henry C. Adams, Ph.D., the president of that association and Professor of Political Economy and Finance, that it would be of advantage to the students in the various departments of the University, to hear a course of lectures on the constitutional law of the United States historically considered.[1] In accordance with the thought thus conceived this course was planned, and the interest manifested in it from the beginning was such as to lead to the belief that the publication of the lectures in permanent form would meet, in part, the wants of students of law and of political science throughout the country.

The subject to which the lectures relate, the constitutional law of the United States, is a branch of jurisprudence which Chief-Justice Sharswood declared to be "peculiarly the pride and glory" of our country; and it has been said with entire propriety to be "the specially characterizing part of our legal system." One may examine the pages of Blackstone's "Commentaries" from beginning to end and he will not be able to find a word devoted to the subject of constitutional law as such, the

[1] The University Calendar for the year 1888–89 shows the total number of students in the University of Michigan to be 1,882, divided as follows: Department of Literature, Science, and the Arts, 824; Department of Law, 400; Department of Medicine and Surgery, 371; School of Pharmacy, 106; Homœopathic Medical College, 73; College of Dental Surgery, 108.

very term not being even named by the learned commentator on the laws of England. Not only is the term one of modern use, but constitutional law as a distinct branch of jurisprudence had its origin and development in the United States. While the remark of De Tocqueville is certainly not true, that "the English Constitution has no real existence," yet the fact remains, that English constitutional law has been so little developed as a distinct branch of jurisprudence that the latest writer on the British constitution has thought it necessary to go into a learned disquisition to prove that "so-called constitutional law" is, in reality, a part of the law of England. He concludes his argument by declaring that the constitutional law of England "forms as interesting and as distinct, though not as well explored, a field for legal study or legal exposition as any which can be found. The subject is one which has not yet been fully mapped out. Teachers and pupils alike, therefore, suffer from the inconvenience as they enjoy the interest of exploring a province of law which has not yet been reduced to order. This inconvenience has one great compensation. We are compelled to search for the guidance of first principles."[1] It is evident, therefore, that while England may have what Earl Russell was pleased to call "a matchless constitution," yet constitutional law as a distinctive branch of jurisprudence occupies a very subordinate place in the legal system of that country, in comparison with the place which it fills in the system of jurisprudence prevailing in the United States. And what is true of England in this respect is true of the other countries of Europe in greater or less degree. The reason why this is so will appear as we proceed.

It is to be remembered that written constitutions have been the distinguishing feature of American institutions. It was in this country, for the first time in the history of

[1] Dicey's "Law of the Constitution," p. 34 (1886).

the world, that written constitutions, based on the idea of the preëxistent right of all men to be free, became the organic law of government. The Constitution of the United States was not, however, the first of the written constitutions to be adopted in America, even though nothing be said of the Articles of Confederation. The States had adopted written constitutions of their own before the Federal Constitution was established.[1] In this country all constitutions, with two exceptions, have been written, and none are now unwritten.[2] Written constitutions were a necessity with us, because we have insisted from the beginning that sovereignty resided in the people, and as the people could not themselves, in their collective capacity, well exercise the powers of government, they consented, through written constitutions, to entrust the exercise of those powers to their representatives, taking care, however, to prescribe by definite constitutional provisions certain limitations on those powers which their representatives should be unable to transcend. The honor has been said to belong to Virginia of having established the first Republican constitution ever adopted in America.[3]

How far written constitutions are advantageous, whether their excellencies are greater than their defects, are questions upon which political theorists have been divided in opinion, and concerning which it is not our purpose here to make inquiry. European nations have been watching our experiment from the beginning, and the tendency of European states, from the time we set the example, has been plainly in the direction of written constitutions. John Adams, writing in 1815, said:

[1] The dates of adoption were as follows: Delaware, 1776; Georgia, 1777; Maryland, 1776; Massachusetts, 1780; New Hampshire, 1784; New Jersey, 1776; New York, 1777; North Carolina, 1776; Pennsylvania, 1776; South Carolina, 1778; Virginia, 1776.

[2] At the time of the Revolution Connecticut and Rhode Island had unwritten Constitutions, which continued in force until 1818 and 1842 respectively.

[3] Cooke's "Virginia," p. 440.

"Since we began the career of written constitutions, the wisest, most learned, and scientific heads in France, Holland, Geneva, Switzerland, Spain and Sicily have been busily employed in devising written constitutions for their several nations. . . . But has there been one that satisfied the people? One that has been observed and obeyed, even for one year or one month? The truth is, there is not one people of Europe that knows or cares anything about written constitutions. There is not one nation in Europe that understands, or is capable of understanding, any constitution whatever. *Panem et aquam, et vinum et circenses* are all that they understand, or hope, or wish for. If there is a colorable exception, it is England. . . . These, sir, were the results of ten years' careful, attentive, anxious, and [if without vanity I may use the word] philosophical observation in France, Spain, Holland, Austrian Netherlands, and England." [1]

But notwithstanding these somewhat pessimistic views of the elder Adams, the tendency then manifested in Europe in favor of written constitutions was not so wholly ephemeral as he imagined, and to-day written constitutions constitute the fundamental law of most of the European governments. The idea that may be said to have originated in America, has not only taken good root in Europe, but has made its appearance on the Continent of Asia. While these lectures were being delivered the Emperor of Japan was promulgating a written constitution at the Imperial Palace in Tokio, and making solemn oath to abide thereby.[2] The reasons which induced this action on his part are of interest, as showing the tendency of the times. The Emperor at the time of promulgation said:

"In consideration of the progressive tendency of the course of human affairs, and in parallel with the advance of civilization, We deem it expedient, in order to give clearness and distinctness to the instructions bequeathed by the Imperial

[1] "Life and Works of John Adams," vol. X., p. 150.

[2] On February 11, 1889, a written constitution was promulgated in Japan.

Founder of Our House and by Our other Imperial Ancestors, to establish fundamental laws formulated into express provisions of law, so that, on the one hand, Our Imperial posterity may possess an express guide for the course they are to follow, and that on the other, Our subjects shall thereby be enabled to enjoy a wider range of action in giving us their support, and that the observance of Our laws shall continue to the remotest ages of time."

However, it does not follow that because a State has a written constitution, constitutional law is to become a recognized branch of its jurisprudence. Constitutional law is a branch of the jurisprudence of our country because in our written constitutions we have not only divided the powers of government between the three great departments, but have made the judiciary coördinate with the legislative and executive departments, giving it power to pass on the constitutionality of laws. This is a peculiarity of the American system of government, and explains why it is that constitutional law is the characterizing feature of our legal system. Foreign commentators on the Federal Constitution have, like Sir Henry Maine, spoken of the Federal Supreme Court as a "unique creation of the founders of the Constitution."[1] As a matter of fact, however, there is little in the Constitution of the United States that is new. A learned writer has recently said that the method provided for the election of the President was about the only feature which it contained that was not suggested by the State Constitutions.[2] But even that was borrowed from the Constitution of Maryland, which provided a similar method for the election of its senators.[3] Before the Federal Constitution was framed the constitutions of the several States had established supreme courts within their States, and those courts exercised the power of declaring legislative acts void, when

[1] Maine's "Popular Government," p. 217.

[2] *New Princeton Review*, September, 1887.

[3] See 2 Pitkin's "Political and Civil History of the United States," p. 302.

in conflict with their respective constitutions, before ever the Supreme Court of the United States asserted a similar power in 1803, in the great case of *Marbury* v. *Madison*.[1] Chief-Justice Brearley of the Supreme Court of New Jersey, in a case before the Court at a session at Hillsborough, in September, 1780, announced as the opinion of himself and his associates that the judiciary had the right to pronounce on the constitutionality of laws. And this is thought to be the first in the line of decisions which have established the right of the courts to declare legislative acts void when they are in conflict with the Constitution. This was followed in Rhode Island in 1786 by a similar decision, and one which led to the trial of the judges by the Legislative Assembly with a view to their removal from office. Neither of these decisions is found in the Reports, as there were none published in either of these States at that time. Again, in 1792, the Supreme Court of South Carolina held that an Act passed by the Colonial Legislature in 1712 was *ipso facto* void as being in contravention of *Magna Charta*. The Court declared that it was against common right as well as against the Great Charter, to take away the freehold of one man and vest it in another without any compensation, or even a trial by the jury of the country.[2] There was no precedent in ancient or modern judicial history, before these cases were decided, which warranted a court in asserting such a principle, and it was difficult for men trained under the English system of jurisprudence, to conceive the idea that a mere court should assume the prerogative of setting aside a law enacted by the legislature and approved by the executive.

It is well understood that in Great Britain sovereignty resides in the Parliament, and that it can change the Constitution at its pleasure. The Parliament can prolong the duration of its own legal existence beyond the period for which it was elected, as it did when it passed the

[1] 1 Cranch, 137.

[2] *Bowman* v. *Middleton*, 1 Bay, 252.

Septennial Act. And it may change the manner of the descent of the Crown, as it did when it passed the Act of Settlement. No matter what law the Parliament may pass, no court can set it aside as enacted in contravention of the Constitution. The saying of De Lolme is familiar. "It is," he says, "a fundamental principle with English lawyers that Parliament can do every thing but make a woman a man and a man a woman." The German Empire has no Federal judiciary unless it be the Imperial Court of last resort, *das Reichsgericht*, established at Leipzig; and it is well known that that court has no power to pass on the constitutionality of a law which has been enacted by the *Bundesrath* and the *Reichstag*.[1] In France, too, the *Cour de Cassation* has no right to pass on the constitutionality of a law which has passed the Senate and the Chamber of Deputies. In Spain, while the Supreme Court is entrusted with the trial of Cabinet Ministers and high public functionaries, it cannot set aside a royal decree, or a legislative act which has passed the Cortes. There is said to be no comprehension in that country between constitution-making and law-making power.[2] In Switzerland, the Federal Legislature is considered to be the authorized interpreter of the Constitution, and the sole judge of its own powers, the Federal Court being bound to enforce every law which the legislature enacts.[3] It is also the rule in Belgium that the legislative department of the government is the judge of its powers, the judiciary not being concerned therewith. In short, there is not in Europe to this day a court with authority to pass on the constitutionality of national laws. But in Germany and Switzerland, while the Federal courts cannot annul a Federal law, they may, in either country, declare a cantonal or state law invalid when it

[1] *Archiv für Öffentliches Recht; herausg. von Laband und Stoerk; Bd.* ii., *s.* 103.

[2] Curry's "Constitutional Government in Spain," p. 94 (1889).

[3] Adams & Cunningham's "Swiss Confederation," p. 267 (1889).

conflicts with the Federal law.[1] Some Swiss jurists claim that the Federal courts cannot enforce a law passed by the Federal Legislature of Switzerland if it conflicts with the Federal Constitution. And in the same way certain of the German jurists assert that if an ordinance were issued in Germany by the Emperor and Bundesrath, trenching on the field of imperial legislation [which should have the assent of the Reichstag], the *Reichsgericht* should decline to enforce it. But we understand that the current of theory and practice is the other way in both countries.

From the fact that in England sovereignty resides in the Parliament, and that it can alter the Constitution according to its pleasure, it happens that the very words constitutional and unconstitutional have a different meaning in that country from what they possess in the United States. In this country where the judiciary are empowered to pass on the constitutionality of laws, an unconstitutional enactment is in reality no law, because, ordained in violation of constitutional provisions, it will not be enforced by the courts. But in England where the judiciary are without this power, it is quite otherwise. In that country political reasoners of the Bentham school have objected to the use of the term constitutional, on the ground that it has no meaning, or that, if it has, it means every thing and any thing. Lord Brougham, however, insisted that the word had an intelligible meaning, and that it was perfectly correct to speak of a law as being unconstitutional. According to his understanding, a law in England may be said to be unconstitutional when it sins against the genius and spirit of the government. And, by way of illustration, he says:

"A bill passed into a statute which should permanently prohibit public meetings, without consent of the government, would be as valid and binding a law as the Great Charter, or

[1] Jellinek, "Gesetz und Verordnung," p. 401.

the Act of Settlement ; but a more unconstitutional law could not well be devised." [1]

And so Mr. Freeman tells us that : " When an Englishman speaks of the conduct of a public man being constitutional or unconstitutional, he means something wholly different from what he means by conduct being legal or illegal." [2] This he explains by saying that if the ministers of the Crown should continue in office after it had been made apparent that they had lost the confidence of the House of Commons, in so doing they would not be guilty of any illegal act which could be made the subject of a prosecution or impeachment, but they would be acting in contravention of the conventional code of the Constitution.

The lectures which follow are concerned with the development of the constitutional law of the Federal Government, and that development is to be sought in the decisions of the Supreme Court of the United States. It has been said that the Constitution created this court for the purpose of construing that instrument. So far as the ordinary forms of power are concerned it is evident, as Mr. Justice Miller told the students in the Law School of Michigan University in an address not long since delivered before them, that it is by far the feeblest department of government. " It has no army, it has no navy, and it has no purse. It has no patronage, it has no officers, except its clerks and marshals, and the latter are appointed by the President and confirmed by the Senate." Feeble as it may thus appear to be, yet in reality the Supreme Court of the United States is more powerful in its influence on the character of the government than is the President or the Congress. It may decide that what the Congress and the President have sought to enact into law is not law, and it may by construction and interpretation declare what meaning shall be attached to the Constitution and the laws enacted thereunder, moulding them according

[1] Brougham on the " British Constitution," p. 285.

[2] Freeman's " Growth of the English Constitution," p. 109.

to its views. The court has been styled, and quite properly so, "the living voice of the Constitution."[1]

When we reflect, therefore, that the Constitution is not simply the work of those who in the Constitutional Convention of 1787 framed it, but is in large measure the work of the men who in the Supreme Court of the United States have been engaged for a century in construing and interpreting it, we are led to the conclusion that a study of the development of the constitutional law of the country naturally commences with a study of the place which that court occupies in the constitutional system of the United States. And this accordingly was made the subject of the first lecture in the course. No part of our system of government deserves a closer study than this, and none reflects more credit on the country. "No feature," says Professor Bryce, "in the government of the United States has awakened so much curiosity in the European mind, caused so much discussion, received so much admiration, and been more frequently misunderstood, than the duties assigned to the Supreme Court and the functions which it discharges in guarding the ark of the Constitution."[2]

That the first lecture in a course on Constitutional Development in the United States should be delivered by Thomas M. Cooley, LL.D., was especially fitting and appropriate. For by common consent he has come to be considered the most eminent constitutional jurist of his generation, the successor of Mr. Justice Story as an expounder of the Constitution. The profession are always ready to listen with interest to whatever he has to say concerning the Constitution and the laws. In this lecture, after directing attention to certain leading and controlling facts in relation to the Constitution, Judge Cooley explains the place of the Supreme Court in our Federal system, and considers the more important cases involving questions

[1] Bryce's "American Commonwealth," p. 266.

[2] Bryce's "American Commonwealth." p. 237.

of constitutional law, decided by the court prior to the appointment of Marshall. The influence on Constitutional Development of John Jay, the first Chief-Justice of the United States, is in this lecture appropriately referred to. Webster once said with truth, that "When the spotless ermine of the judicial robe fell on John Jay it touched nothing not as spotless as itself."

The second lecture, "Constitutional Development as Influenced by Chief-Justice Marshall," was delivered by Henry Hitchcock, LL.D., of St. Louis, Mo. Mr. Hitchcock is known to the bar of the United States as one of its distinguished members, a learned lawyer, and accomplished scholar, whose name as we write is being mentioned with favor for the place on the bench of the Federal Supreme Court made vacant by the death of Justice Matthews. In this lecture he has portrayed the public life and services of Marshall as a soldier, lawyer, legislator, diplomatist, and statesman, as well as his judicial career. Few there probably are who will call in question the conclusion of the lecturer when he says, that no judicial career in history affords a parallel to that of Marshall. Lord Mansfield united his name forever with the Commercial law of England as the creator of that branch of English law. Lord Stowell identified his name for all time with the Admiralty Law, and Lord Nottingham his with that of Equity Jurisprudence. So the name of Marshall will be linked through the coming years with the Constitutional Law of the United States. He not only laid the foundation, but raised the superstructure of our splendid system of constitutional law. And the student should remember that this work was more difficult of accomplishment than was that done by either Mansfield, or Stowell, or Nottingham. What those great judges did was not the result of their own unaided minds, for they had the benefit of a knowledge of the writings of the continental jurists in similar fields of labor. Marshall's

task, on the other hand, was to reach conclusions in matters concerning which there were no precedents at home or abroad. His task was to "cleave his way through a pathless forest, with no help but the resources of his native genius and sagacity."[1] He was pre-eminently the expounder of the Constitution. It was once said of Lord Mansfield that the most sober jurist contemplating the temple of commercial law which Mansfield reared, might with enthusiasm exclaim: *Si monumentum quæris, circumspice.*[2] Changing the phraseology we might more appropriately apply the remark to Marshall and the temple of constitutional law.

The third lecture, "Constitutional Development as Influenced by Chief-Justice Taney, was delivered by George W. Biddle, LL.D., Chancellor of the Bar Association of Philadelphia. Mr. Biddle was the life-long friend of Chief-Justice Sharswood, of Pennsylvania, one of the greatest judges that commonwealth ever possessed. Justice Sharswood in dedicating to Mr. Biddle one of his publications announces that he does so in testimony "of the highest admiration of his qualities as a man, a citizen, an advocate, and a jurist." The period included in Mr. Biddle's lecture is a very important one in the history of the country, and one appealing to the interest of every student of our constitutional system. As Chief-Justice Taney presided in the Supreme Court of the United States for more than a quarter of a century, and during the period of the Civil War when the court was called on to decide questions of vital importance growing out of the complications of the time, the potency of his influence on Constitutional Development will be readily appreciated. Taney is considered as next to Marshall the greatest of the Chief-Justices. And the student of constitutional law will find on a careful reading of the opinions that

[1] Magruder's "Life of Marshall," p. 165.
[2] Story's "Miscellaneous Writings," p. 276.

while Taney's views of the Constitution were somewhat less in the direction of centralization of power than were those of Marshall, he was ready to sustain the powers of the Federal Government, and ever did so to the satisfaction of the country, with the exception of the unfortunate decision which he pronounced in the Dred Scott case. He was a learned and profound lawyer, whose power of subtle analysis, Mr. Justice Curtis said, exceeded that of any man he had ever known.[1] It has always been considered a fortunate circumstance, that for a period of over sixty years the great office of Chief-Justice of the United States was occupied by only two persons, thereby securing to our system of constitutional law, and to our national jurisprudence, uniformity and completeness.

The fourth lecture, "Constitutional Development as Influenced by Decisions of the Supreme Court since 1864," was delivered by Charles A. Kent, A.M., a member of the bar of Michigan, who for eighteen years was a respected professor in the Law School of the University of Michigan. The period covered by the lecture includes the judicial careers of Chief-Justices Chase and Waite. It is a period of great historical interest and importance, the court having been called to pass on the Thirteenth, Fourteenth, and Fifteenth Amendments, on the legislation of the period of Reconstruction, the great question involved in the Legal Tender Cases, and other questions of grave and serious import. During this time the principle was established that we possessed under the Constitution "An indestructible Union of indestructible States." There was developed, as a consequence of the struggle for national existence in which the government was engaged, a school of constitutional construction of perhaps more liberal tendency than any that had hitherto existed. And the Constitution of the United States became, by

[1] See Tyler's "Memoir of Taney," pp. 511, 512.

changes made in its formal expressions as well as in the spirit of its construction, an instrument of government quite different from that framed by the Fathers. It still remains, however, the most conservative instrument of government known to the world, commanding our respect and veneration, and giving assurance to all our people that peace, happiness, and prosperity await us so long as we conform to the provisions which are therein contained. The changes which the Constitution underwent during this period, and the many questions of constitutional law then raised and settled, are happily stated in the lecture referred to.

The fifth lecture was delivered by Daniel H. Chamberlain, LL.D., at one time Governor of South Carolina, and now a well-known member of the bar of the city of New York. The people of the United States live under a dual form of govenment, being subject in certain matters to the National Government, and in certain other matters to the government of the States. And as the opening lecture in the course was devoted to a consideration of the place of the Federal Supreme Court in our constitional system, it was entirely fitting that the closing lecture should treat of the place of the State Judiciary in the same system. The lecture delivered by Governor Chamberlain will be found to contain an interesting discussion of the relations which exist between the States and the United States, and the opinion is advanced, that after the Declaration of Independence and prior to the adoption of the Federal Constitution the States were sovereign and independent, but since the adoption of that Constitution the States and the United States have each been sovereign within the limits marked out by that instrument. The respective limits of the jurisdiction of the State and Federal courts are clearly stated, the State judiciary being possessed of all the judicial power belonging to a sovereign State which is not vested by the Constitu-

tion in the United States. The extent to which the Supreme Court of the United States will go in following the decisions of a State court in matters of local law is next stated; and then a comparison is instituted between the character of the State and Federal judiciary as a body. In the opinion of Governor Chamberlain there has not been a time when the average of judicial ability of the State judiciary, in at least the oldest and best governed of the States, has fallen below the average ability displayed by the Federal judiciary. I venture in this connection to add the following opinion on the same subject from the recent work of Professor Bryce:

"Of the State judges it is hard to speak generally, because there are great differences between State and State. In six or seven commonwealths, of which Massachusetts is the best example among eastern, and Michigan among western States, they stand high—that is to say, the post will attract a prosperous barrister, though he will lose in income, or a law professor, though he must sacrifice his leisure. But in some States it is otherwise. . . . In the Federal courts and in the Superior courts of the six or seven States just mentioned it is equal to the justice dispensed in the Superior courts of England, France, and Germany. In the remainder it is inferior, that is to say, civil trials, whether the issue be of law or fact, more frequently give an unsatisfactory result; the opinions delivered by the judges are wanting in scientific accuracy, and the law becomes loose and uncertain." [1]

Mr. Justice Stanley Matthews, whose recent death deprived the Supreme Court of one of its most brilliant and accomplished members, took a deep interest in this course of lectures from the time it was planned to the date of his death. He had been invited to deliver the fourth lecture, covering the period of Constitutional Development since 1864, and had consented to do so, hoping to employ the leisure of his summer vacation of 1888 in preparation. He made some collection of material for the purpose

[1] "American Commonwealth," pp. 497, 498.

when he was stricken with illness, compelling him to cancel his engagement "with extreme reluctance and much regret," and finally resulting in his death. But even after he recognized the necessity which compelled him to abandon his purpose, he continued in several letters to express his interest in the course, as may be seen from the following extract taken from a letter dictated from his sick chamber not many weeks before his death. He writes:

"I deeply regret the disability which I foresaw would prevent my taking part in the interesting course of lectures before the University of Michigan, of which you send me the program. I congratulate you on the list of strong, able, and sound men whose names constitute the list. I hope when the lectures appear in print to be able to study and enjoy them, as I shall no doubt profit by them."

He then adds certain suggestions in regard to the publication of the lectures, which he thought would add greatly to the permanent value of the work. And in a letter which he requested his wife to write less than a week before his death, he again declares that he very much regrets that he is not to take part in the discussion, adding that he would have liked to have his name appear in connection with the publication. The University of Michigan would have experienced a profound satisfaction if Mr. Justice Matthews had been permitted to present to its students his views of the development of the Constitution; but in the Providence of God, that was not to be.

As the lectures relate to the Constitution of the United States, it may not be inappropriate to briefly direct attention to the leading historic facts connected with the origin of this Great Charter of the government. On the 21st day of February, 1786, the legislature of Virginia passed a resolution, introduced by Mr. Madison, appointing commissioners to confer with commissioners to be appointed

by the other States with a view of considering "how far a uniform system in their commercial relations might be necessary to their common interest and their permanent harmony." Accordingly there assembled at Annapolis, in September, 1786, delegates from New York, New Jersey, Pennsylvania, Virginia, and Delaware. Resolutions were passed by them recommending a convention of delegates from all the States, "to devise such further provisions as might appear necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union." This resolution was presented to Congress, and that body, on the 21st of February, 1787, resolved that :

"It was expedient that on the second Monday in May next, a convention of delegates, who shall have been appointed by the several States, be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress and confirmed by the States, render the Federal Constitution adequate to the exigencies of government and the preservation of the Union."

The convention thus provided for began its work in May and continued its deliberations without intermission until the 17th day of September of the same year, when its work was completed and submitted to the States for their ratification. All of the States but Rhode Island had participated in the deliberations of the convention, and a majority of the delegates of each of the States represented affixed their signatures to the instrument as finally agreed on. The convention had not confined its attention to a revision of the Articles of Confederation, as had been contemplated in the resolution of Congress under which it was acting, but formulated an entirely new instrument, creating a government of an entirely different nature from that then existing. It pro-

vided that the ratification of the Constitution by nine States should be sufficient for its establishment between the States so ratifying the same. The Constitution having been transmitted to Congress by George Washington, the President of the Convention, that body directed, on September the 28, 1787, that it be submitted "to a convention of delegates, chosen in each State by the people thereof, in conformity to the resolves of the convention." And thereupon the legislatures of the several States called on the people to send delegates to their State conventions, take the matter of ratification into consideration, and report the result to Congress. Rhode Island alone declined to call a convention. The Constitution was thus submitted to the people for adoption, and the question gave rise to a bitter conflict of opinion. As Von Holst has said, "the decision hung upon a single hair."[1] But on July the 2d, 1788, the President of Congress informed that body that the Constitution had been ratified by the conventions of nine States, and a committee was on that day appointed to report an act "For Putting the Said Constitution Into Operation." On September the 13th it was agreed that the government under the Constitution should be inaugurated on March the 4th, in the city of New York. The senators- and representatives-elect to the Congress were slow in assembling, and a month elapsed beyond the time agreed on before a quorum was obtained for the transaction of business. And it was not until April the 30th that Washington took the oath of office as President of the United States, the Centennial of which event is being fittingly commemorated in the city of New York, even as these pages are running through the press. Well might Sir James Mackintosh write: "America has emerged from her struggle into tranquility and freedom, into affluence and credit; and the

[1] 1 Von Holst's "Const. Hist. of the United States," p. 50. A change of 2 out of 60 votes in New York, of 5 out of 168 votes in Virginia, and of 10 out of 355 votes in Massachusetts would have worked its defeat.

authors of her Constitution have constructed a great permanent experimental answer to the sophisms and declarations of the detractors of liberty." [1]

It has been said that the lawyers of the colonies were of necessity better fitted for constitution making than any body of legislators in the world. And this remark we believe is entirely true. The controversies which led to the secession of the colonies from the mother country turned on questions of law. The colonists complained of a violation of their natural and constitutional rights at the hands of Great Britain, and the colonial lawyers were the leaders in the contest. They, therefore, studied profoundly works on government, and on the philosophy of history, as well as the philosophic writers on jurisprudence. Moreover, it had been for years their vocation to make old laws conform to the changed conditions of life in the new world, rejecting that which seemed unsuitable to the situation in which they found themselves. They were thus prepared as no other class of men ever had been for the construction of written constitutions. They were the authors of the constitutions of the States, and afterwards of the Constitution of the United States.

In conclusion it may be said that the subject of these lectures is of general interest to every American citizen who desires to understand the nature of the government under which he lives, and to students in the various departments of knowledge who are desirous of a broader culture than is to be derived from the mere pursuit of their own particular specialties. At the same time the subject is one of particular interest to those engaged in certain branches of study.

1. The subject necessarily appeals most directly to those who are engaged in the study and practice of the law. To all such persons a knowledge of the constitutional law of the United States and of its development is indispensable. As the specially characterizing feature of

[1] "Miscellaneous Works of Sir James Mackintosh," p. 581.

our system of jurisprudence, it deserves and receives their most profound study.

2. The subject is one of particular interest to students of Political Science. It was with entire appropriateness that the lectures were delivered under the auspices of a Political Science Association. The πολιτικὴ ἐπιστήμη of the ancients was concerned with a study of the art of regulating the state and the means of preserving and directing it. And the Political Science of our day is likewise concerned with a study of the fundamental principles of government. Every student of Political Science in the United States is obliged, in the prosecution of his studies, to give particular attention to a study of the Constitution of the United States, which is the fundamental law for the government of the country.

The student of the theories of political parties should remember that the Supreme Court of the United States was dominated by the spirit of the party of the Federalists from the foundation of the government in 1789 to the death of Chief-Justice Marshall in 1835, and by that of the Democratic party from that time to the death of Chief-Justice Taney in 1864, and by that of the Republican party from that day to the present. And he will be interested in his study of the decisions to observe to what extent the political convictions of the court gave color to their conclusions on constitutional questions. These three periods in the history of the court are considered respectively in the second, third, and fourth lectures of this series.

3. But this subject is also of interest to the student of history. As Judge Holmes has said, "the law embodies the story of a nation's development." And so it happens in our higher institutions of learning that instruction is provided for students of history in what is known as "Constitutional History," the history of the development of the Constitution of the country. The student of law in our times has come to recognize the fact that law is, in

a sense, a branch of history, and is to be studied in a historic spirit and by a historic method. So true is this that a recent English law writer is led to say that "It were far better, as things now stand, to be charged with heresy, or even to be found guilty of petit larceny, than to fall under the suspicion of lacking historical-mindedness."

And as the student of law now recognizes the relation which exists between law and history, so also has the student of history come to recognize that a certain relation subsists between history and law.

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LECTURE I.

THE FEDERAL SUPREME COURT—ITS PLACE IN THE AMERICAN CONSTITUTIONAL SYSTEM.

By THOMAS M. COOLEY, LL.D.

THE FEDERAL SUPREME COURT—ITS PLACE IN THE AMERICAN CONSTITUTIONAL SYSTEM.

REPRESENTATIVE institutions have been aptly characterized by an eminent English author and lawyer as "that great secret for reconciling liberty with order which was never discovered by antiquity."[1] These have had their best and highest development in the United States of America, and the course of lectures which is begun to-day will have for a general subject the Federal Judicial Power, and the part it has had in this development.

In this opening lecture attention will be directed principally to the chief custodian of that power, the Federal Supreme Court, with a view to indicating as clearly as may be the place which, under the Constitution, it holds in the government.

The history of the country preceding the ratification of the Constitution, and the series of events which resulted in the organization of a national government for States which before were but loosely confederated, it will be assumed, are too well known to require recapitulation at this time. We shall therefore content ourselves with the statement that nowhere does the national character of the Government appear more distinctly than in the article of the Constitution which provides for the judicial department, and determines what shall be the scope of its power. But before considering this article it will be convenient to take some notice of such peculiarities of the Federal Constitution as specially distinguish it from the fundamental laws of other countries.

[1] Forsyth: "Life of Cicero," I., 216.

The praise bestowed by the ablest and most versatile of contemporary English statesmen upon the Federal Constitution is familiar to all Americans. What makes it deserving of his encomiums is not the fact that it indicates remarkable genius in its framers; that it embodies new and wonderful maxims in government; or even that it demonstrates the founders to have had a talent for government beyond that of their forefathers. In point of fact the Constitution was only in a very narrow sense a new creation of institutions. The American Constitution, as truly as that of England, is a growth, and the wisdom of the founders of the existing Union was shown chiefly in this: that in perfecting the general government they disturbed as little as possible the existing institutions which were the growth of ages, and which were as much a part of their race inheritance as were their own physical and mental peculiarities and tendencies. At the same time, by the provision they made for the amendment of their work, they took care that there should be no iron-bound structure by which growth in the future should be precluded. In short, the establishment of government under the Constitution was preservative even more than it was creative: it was meant to preserve and perfect the existing Union; to preserve to the States their local governments and inherited institutions; to exclude the possibility of monarchical innovations; and to perpetuate the principle of constitutional growth. What was particularly noticeable in the case was chiefly this: that the framers of the Constitution adhered so closely to the lessons of experience, and trusted so little to their own speculations and inspirations. In so far as the Constitution was a new creation, it was limited strictly to what seemed to be the necessities of the case.

Whoever examines the Federal Constitution with a view to just interpretation, is under the necessity of bearing in mind certain leading and controlling facts.

First. He is to consider the Constitution as a written

instrument complete within itself. It does not constitute the complete structure of American constitutional authority and right, for the States, with all their powers and protections, are a part of this, and are not for a moment to be excluded from consideration. But national authority is conferred and measured exclusively by the written instrument, and prescription cannot, as in other countries, aid it, or precedent enlarge it. There is also at all times a certainty about it which cannot exist when the Constitution is prescriptive and unwritten, subject, as it would then be, to continual change and to dispute as to what change is in fact at any time definitely effected. The importance of this fact will readily be perceived, but it cannot now be enlarged upon.

Second. The Constitution is in terms declared to be the supreme law of the land; supreme not only over all citizens, but over all the States and all State authority. This also is a fact of paramount significance.

It is implied in the definition of a constitution that it is a fundamental law. But it is not a necessary part of the definition that it shall be a supreme law. Most constitutions, neither in their intent nor as administered, are supreme in the sense that the government itself in its several departments is held by the constitution in strict control, as is intended shall be the case with the American Union. Take up any history of Europe during the present century, and nothing will be found more often recorded than the grant of constitutions by princes to their subjects. But the authority that granted could also revoke, and it is seldom that a constitution has acquired any permanence. The instrument which thus for its very existence depended upon the pleasure of a prince could not possibly in any true sense be a supreme law. When the government, whatever the form, grants a constitution, it necessarily remains supreme over it. Quite emphatically has this been true of all unwritten constitutions. Fundamental laws which derive their origin from prescrip-

tion must assume the existence of a government which is in possession of sovereign powers, and whose laws, therefore, from time to time enacted, must from the very fact of this sovereignty be supreme. The constitution of England is no exception to this rule: it is and must be in subordination to the Parliament, and the Parliament may at any time exercise the power to enact laws in modification of its principles. The "omnipotence of Parliament" is thus seen to be not a figure of speech merely, but a potential reality.

Third. This fundamental difference between the American Constitution and the constitutions of other countries, whereby the one is made the supreme law while others are subordinate, invites mention of the different theories on which the structures of government respectively are erected.

The theory on which all government in America is constructed, is that sovereignty is in the people. This is not theory merely, for its acceptance makes it the most important and vital fact in government. According to American ideas it is the only true theory, which because it is true ought to be accepted as a foundation fact everywhere; but the usage of the world is otherwise. Nor is it surprising that it should be so, for nearly all government has originated in despotism, represented either by a single ruler or by some small oligarchy, and the growth of constitutional liberty has consisted in gradually winning from the despotism a concession of certain rights and privileges. But the concession that the government is not sovereign can never by possibility be won through usage. The theoretical sovereignty may pass from king to parliament, as it did with the rise of parliamentary power in England; but first and last in that country, and almost everywhere else, the sovereignty has attached to the power of legislation. It is therefore subject to constitutional restraints only so far as they may have moral force: they can possess no other.

The builders of the Constitution of the United States, on the other hand, were to create a governmental structure at once, not to wait for one to grow. The only governments then in existence whose authority they recognized were their State governments, and these had all been constructed on the theory of sovereignty in the people. A general government must necessarily be framed on acceptance of the same theory: 1, because there was then no general authority exercising supreme power over the people to construct one for them; and 2, because any other theory was foreign to the ideas on which the Revolution had been undertaken and independence achieved. The Constitution, when framed, was therefore referred to the people of the States for their acceptance, and the ratification by them as the sovereign authority made it what in terms it was declared to be, the supreme law.

Fourth. When we look into this supreme law, we note as its most prominent characteristic that the powers of government are to be exercised, not by the sovereign authority, but by officers and departments created as agencies for the purpose, and clothed for the time being with certain delegated functions. The legislature is itself one of these agencies, with powers limited in the delegation, so that in the nature of things it is impossible that it should assert and take to itself the complete legislative power, expressed in the term "legislative omnipotence," which is claimed and exercised by the Parliament of the British Empire.

This want of sovereignty in the government, or in any branch thereof, follows so necessarily from the manner in which the Constitution was called into existence, that the tenth article of the amendments was scarcely necessary to make it plain that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." Chief-Justice Marshall expressed the

principle in somewhat different words when he said: "The Government of the United States can claim no powers which are not granted to it by the Constitution"; adding as a rule of construction that "the powers actually granted must be such as are expressly given, or given by necessary implication"[1]; and again when he said that the Constitution "contains an enumeration of the powers expressly granted by thepeople to their government."[2] They are enumerated, but to the full extent of the grants made they are supreme.

The grant of judicial authority it is declared by the Constitution "shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made or which shall be made under its authority; to all cases affecting embassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State and citizens thereof and foreign States, citizens, or subjects."[3]

Manifestly the grant was intended to embrace every possible federal question. And what is a federal question? First we may say, every question which concerns the federal authority, and the decision upon which may tend to preserve that authority in its integrity, or, if erroneous, to weaken, undermine, or defeat it. Every question, therefore, of the validity of an act of Congress, or of any authority claimed or exercised under an act of Congress, or under the Constitution itself, is a federal question. The judicial power may therefore be said in general terms to be co-extensive with both the legislative and executive; for the exercise of authority by either may be the subject

[1] Martin *v.* Hunter's Lessee, 1 Wheaton's Reports, 326.
[2] Gibbons *v.* Ogden, 9 Wheaton, 187. [3] Constitution, Article 3, § 2.

of a case in law or equity between parties whose interests it may affect. It is co-extensive also with the treaty-making power in so far as that power in its exercise can present judicial questions.

But there are federal questions which arise outside the sphere of either the federal, legislative, or executive power, so that the grant to the judicial department may be justly said to be broader than that made to either of the others. Such a question was presented when in the Dartmouth College case a corporation claimed that a State enactment remodelling its charter impaired the obligation of a contract.[1] The question presented concerned State authority, not federal, and the wrong if there was one could neither be righted by the Congress nor by the President, for no power of redress had been given by the Constitution to either; it was a wrong done under assumed State authority, and must have passed unredressed but for this grant of judicial power, which embraced it because the case which presented the question was one arising under the Federal Constitution. Such a question was presented again when after the civil war certain of the States undertook to impose legislative punishments for treasonable conduct;[2] and also in many other cases which need not now be named. To bring a case at law or in equity within the scope of the federal judicial power, it is enough that the question which it presents is one which depends for solution upon the Federal Constitution; it need not otherwise concern the federal authority.

We may pass over the fact that the judicial power is made to extend to cases of admiralty and maritime jurisdiction, since the legislative embraces them also, and notice that it is made to include cases to which embassadors, other public ministers, and consuls are parties, the purpose being to keep the foreign relations of the country exclusively under the control and protection of the fed-

[1] Dartmouth College, *v.* Woodward, 4 Wheaton, 518.

[2] Cummings *v.* Missouri, 4 Wallace, 277.

eral power, and to exclude the jurisdiction of State courts, which, both from their number and from the State authority not being charged with responsibility in respect to international affairs, would constitute unsuitable tribunals for the trial of cases in which international controversies would be likely to arise. But further on in the grant we perceive that it is not limited to federal cases, but is made to embrace large classes of cases where the question may not be federal in any sense. Such a case is a controversy arising between two or more States, in which the questions for decision may in no degree touch or affect the federal authority, or be different from that which might arise in a State court between two private citizens. Such also is a controversy between two parties claiming lands under grants of different States. But though the question in these cases would not be federal, the reason for the grant of jurisdiction is federal, since the purpose is to give, for controversies in which State tribunals might be suspected of partiality, a tribunal as free from such suspicion as from the nature of the case would be possible.

We see, therefore, that the grant of judicial power covers the whole field of federal jurisdiction, so that no question of national authority can be raised to which it does not extend; that it also embraces every possible right, privilege, or exemption that may be claimed under the Federal Constitution, whether created or given for federal reasons or for the benefit of the citizen as an individual; and that beyond all these it is made to reach cases which otherwise must go for decision to tribunals not altogether impartial, with the not improbable result of provoking State jealousies and disturbing the peace of the Union. In short, the grant was meant to be a grant not only adequate for all the purposes of a shield to national authority, but also, where federal questions were not involved, to constitute a bond of union and a protection against disturbing controversies which would otherwise be without suitable means of peaceful and orderly settlement.

It is to be observed of this grant, however, that while it prescribes the extent of federal judicial power, it does not confer that power upon particular courts. The establishment of courts was left to Congress; and not until they were created and their jurisdiction defined, would it be determined how much of this power would be referred for exercise to one federal court or to another, or indeed whether the whole should be assigned to federal courts. A subsequent clause of the judiciary article provided that "In all cases affecting embassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction"; but this was the extent to which express grant was made to any court. This is particularly to be noted and borne in mind, since, with the single exception mentioned, every federal court must show legislative authority for the jurisdiction it assumes to exercise. And it may be added that there never has been a time in the history of the government when the complete judicial power has been devolved for execution upon particular courts. Something less than this has been thought to accomplish the purposes of the Constitution.

It is further to be observed that the grant made is of judicial power only. Judicial power is the power to take cognizance of controversies of a judicial nature, to determine what the law is that governs them, and to apply and enforce that law as between the litigants. It is implied that there shall be a tribunal clothed by law with authority to hear the case, and parties lawfully subjected to the jurisdiction of the tribunal so that its judgment shall bind them. When these things concur, the tribunal can speak with authority, and what it declares to be the law must be taken to be the law; when either of these things is wanting, the tribunal misjudges, if it speaks at all, for its utterances, though they be given deliberately and in form of solemn judgment, will bind no one.

It is commonly said that the Federal Supreme Court is

the authorized exponent of the Constitution, and that its construction is to be accepted as final. But when the requisites to authoritative judicial action are noted, it is clearly seen that questions of construction must commonly arise first before some other authority. This is so even when the questions arise between litigants; for the jurisdiction of the Federal Supreme Court is for the most part appellate, so that it considers a question of constitutional authority only by way of reviewing the action of some other court. The question is not unlikely to arise first in a State court; and for the purposes of review the Judiciary Act, which was one of the earliest measures adopted by the Federal Congress, has provided for an appeal from the State to the Federal Supreme Court. Provision has also been made by law, under which a party to a case in a State court, which presents a federal question, may have it removed to the proper federal court for trial before the State court shall have passed judgment upon it. In either case the final judgment, when ultimately made by the Federal Supreme Court, is conclusive upon the litigants.

But the federal question that thus arises in a State court may be one of the constitutional validity of a State law, and the decision which sustains the claim made under the Federal Constitution may necessarily hold the State law to be invalid. Some such cases have already been referred to, in which, by the solemn judgment of the Federal Supreme Court, State laws, whose validity had been affirmed by the State judiciary, were nevertheless annulled. Other cases, such as the attempted State taxation of the national bank,[1] and the attempted State grant of a monopoly of its navigable waters,[2] are notable instances in which great States, proud of their sovereignty, have had their most deliberate action called in question, and annulled by a single entry on the journal of a court.

[1] McCollough *v.* Maryland, 4 Wheaton, 316.
[2] Gibbons *v.* Ogden, 9 Wheaton, 1.

The settlement of the most insignificant neighborhood contention could not be more undemonstrative nor more effectual.

But the federal question, instead of arising between litigants, may be first presented in the federal legislature. It must always be first presented there when it involves the constitutional power to enact a proposed federal law. But when thus presented it is a legislative, not a judicial question, and it does not pertain to the judicial authority to express an opinion, or to give advice upon it. The same is true when the proposed legislation is adopted by the two houses, and presented to the President for his approval: the President must determine for himself any question of constitutional power which his approval may involve. If he decides against the proposed law, and it is not passed over his objections, no judicial question concerning it can be presented, for the plain reason that, what was attempted to be done having proved wholly ineffectual, it is not possible that it should be the subject of a judicial controversy. Whatever federal question was involved must, therefore, remain without any such authoritative decision as would conclude any department of the government, or any citizen in case the same question should arise in the future. It may thus happen that federal questions will receive the deliberate attention and be finally acted upon by Congress and the President, without the possibility of judicial intervention for the correction of any errors of opinion into which they may have fallen.

When the federal question concerns proposed legislation which fails of adoption, any opinion the federal judges may have upon it can be of no practical importance, and an erroneous conclusion by the political departments can introduce into the federal system no disorders. There are cases, however, in which the political departments of the government may take important affirmative action, which nevertheless cannot be reviewed

in the courts. These are cases in which the questions involved are purely political, and cannot, therefore, become the subject of a suit at law or in equity between parties litigant. Such a case is presented when there is contention over the possession of lawful State authority, and when Congress or the President intervenes under the constitutional duty to guarantee to the States a republican form of government.[1] Such cases arose when the States were being reorganized under the reconstruction acts after the civil war. Such decision as the political departments of the government reached in these cases was final and conclusive, from the very fact of the questions presented being exclusively political. But such cases are not numerous, and the fact stands as the general truth that the federal judiciary is the authoritative expounder of the Constitution, because its judgment in matters of construction it has the power to enforce.

This is a great power; and there being included in it the power to annul not only Federal but State enactments, the fear has often been expressed that it must at length give the judiciary a preponderance in the government. The Federal Supreme Court is final judge of its own authority; and the judges have thus the power, as Mr. Jefferson, in his alarm at their supposed encroachments, pointed out, "to lay all things at their feet."[2] The alarm has proved uncalled for. Those who follow me in this course will be able to show very clearly that, though the federal judiciary has not always kept within the undoubted limits of its authority, it has more faithfully guarded both the rights of the States and of the citizen than has either of the political departments of the government, and that we owe to it and not to them the clear and authoritative declaration that the Constitution, with its guaranties of liberty, "is a law for rulers and for people, equally in war and in peace, and covers with its shield of protection all classes of men at all times and under all circumstances."

[1] Luther *v.* Borden, 7 Howard, 1.

[2] 7 Works, 193.

In two historical cases the court ventured to express formal opinions on federal questions without having such jurisdiction of a case as would empower it to give relief. The result should have been anticipated: the utterances, not being authoritative, were not obeyed. Mr. Jefferson treated with no respect the opinion of Chief-Justice Marshall, that it was the duty of his secretary to deliver a judicial commission which had been signed by his predecessor[1]; and Mr. Lincoln, representing a different political organization, rejected quite as emphatically the opinion of Chief-Justice Taney, that Congress was without constitutional power to exclude slavery from the territories.[2] Each party in its turn was solemnly reverential of the utterances of the court, which accorded with its views; and the bitter complaints of those who rejected the authority of the court as final arbiter of constitutional questions, with which the federal parlors were eloquent in 1801, were echoed back sixty years later in Tammany wigwams.

In the main, however, it can be said that the court has kept closely within its jurisdiction. Edmund Burke once said: "Whatever is supreme in a state ought to have, as much as possible, its judicial authority so constituted as not only to depend upon it, but in some part to balance it. It ought to give a security to its justice against its power. It ought to make its judicature, as it were, something exterior to the state." As nearly as possible, this has been accomplished in America. The judges, in respect to tenure of office, are altogether independent of the legislature; and in the making of laws, which is the highest expression of sovereignty under the Constitution, they have no participation. Neither do they have any part in executive power.

We do not overlook the fact that it is possible for the President, or for Congress, and especially for both acting

[1] Marbury *v.* Madison, 1 Cranch, 137.

[2] Scott *v.* Sanford, 19 Howard, 393.

together, very seriously to embarrass the court, and to limit its action as an authorized expounder of the Constitution. It is remembered that, in one case, in the exercise of its power to assign judicial authority to particular courts, the Congress, by law, took away the right of appeal to the Supreme Court in a certain class of cases, with the avowed object of preventing the court deciding a constitutional question which the cases were expected to present.[1] It would not be impossible by law to increase the membership of this court of final resort with a view to the effect of the change on constitutional questions, as, indeed, it has been charged was once done.

It may also be said that cases will arise in which the court will be powerless to enforce its own judgments without executive aid, and that the President, who should give the aid, may, instead, withhold it. Something like this did in fact take place during the controversy between the State of Georgia on the one side and the Cherokee Indians and the missionaries among them, on the other, during the presidency of Andrew Jackson. One arm of the government was thereby in the particular case paralyzed. But a similar thing might quite as likely occur to block the proper operations of government in other directions. It is matter of history that on more than one occasion it has been seriously proposed in Congress to defeat a treaty duly ratified by refusing an appropriation necessary to give it effect, and that in the case of Jay's treaty with Great Britain an attempt in that direction came near succeeding. Had it succeeded it would have been a political crime of great magnitude, the consequences of which might have been such as to endanger the Union itself. But to say that such wrongs are possible under institutions so carefully framed as ours, is only to say that it is not in the nature of things that all evils in government should be completely and perfectly guarded against. The alternative to independent depart-

[1] See McCardle's Case, 7 Wallace, 506.

ments of government with powers that may possibly be abused, is a despotism with powers the abuse of which would be certain. We reject the despotism, and happily we are able to see, in the light of a century's experience, that the probability that at any time one department of government will defeat the proper exercise of authority by another, by refusing the necessary co-operation, is not so great as to give ground for fear of serious danger to the constitutional structure. When the fact is considered that from the foundation of the government to the present day parties have divided upon constitutional questions, sometimes one party controlling the government and sometimes another, and that the antagonisms on questions of construction have been more violent and determined than on any others, it is surprising, not that such abuses have occurred, but that they have been so few in number.

When the duty was devolved upon Washington to organize a government under the Constitution, no appointments he was called upon to make were more important to the country than those of the Justices of the Supreme Court. Especially was that of Chief Justice of first importance. An error in this regard might have brought into the federal system mischiefs that in a little time would have become inveterate and irremediable. The Constitution was then to be delivered to the several departments of a new government for practical application and construction. In the aggregate and in detail it had been the subject of earnest controversy in the several States, and the question of its acceptance by the people was for a long time doubtful. But with acceptance the controversy over it did not come to an end. The Constitution was still to be interpreted and applied according to the meaning it should be found to express. Those who had not agreed upon its meaning in the abstract were still less likely to agree when the questions of interpretation came to be presented in the concrete. The decision upon

them when thus presented might determine whether the Constitution was to be a bond of union or a rope of sand ; for the practical construction might make it the one or the other.

When the time is considered, and the circumstances under which the duty of authoritative construction must be entered upon, one cannot fail to be impressed that peculiar qualifications were essential in the person who should preside over the body to whom that duty would be entrusted, and who would give direction to its thought. He ought certainly to be a learned and able lawyer ; but he might be this and still fail to grasp the full significance of his task. A mere lawyer might see in the Constitution nothing but an agreement of parties, to be construed by technical rules ; it required a statesman to understand its full significance, as an instrument of government instinct with life and with authority.

No other man prominent in the public councils, and generally known to the country, possessed in so eminent a degree the varied qualifications essential to the task as did John Jay. He had been one of the leaders in preparing the mind of America for independence through the public press. He had drafted the first Constitution of New York, and when it was put into effect he was made Chief Justice of the State under it. Very soon, however, he was called into Continental service, and as member of Congress was made its presiding officer. But he remained in Congress but a short time, and was then sent abroad as Minister to Spain. With Franklin and Adams he negotiated the treaty of peace and independence, and coming home was appointed to the post of Secretary of Foreign Affairs. He contributed articles to the *Federalist* in advocacy of the Constitution, and was a member of the Convention of New York which ratified it. The duties of all these official employments he performed with admirable skill and fidelity, but they were not allowed so completely to engross his thoughts as to

preclude his looking beyond them to fundamental principles of right and justice that should govern the action of every citizen. He was among the first to perceive the infinite wrong of human slavery, and the wretched inconsistency of a people fighting for liberty with the right hand while with the left holding their fellow-men in hopeless and brutalizing bondage; and with views not more philanthropic than statesmanlike, he made himself an active member of a society which had for its object, by abolishing slavery, to bring the practice of his country more nearly into harmony with its professions, and to relieve the horizon of the future of the dark cloud which while slavery existed must inevitably hang over it. He was thus in a true sense a broad as well as an experienced statesman, jurist, and diplomatist; and in no other position in the government were his great and varied attainments calculated for such eminent usefulness as in that to which the wisdom of Washington now summoned him.

On every hand difficulties surrounded the organization of the new government, but the questions with which the judiciary would have to deal were not only in themselves intricate and troublesome, but they were peculiarly susceptible of appeals to popular prejudice and passion. First, there was the question of enforcement of debts to British creditors contracted before the Revolution, and which it was hoped might be defeated under State statutes of limitation notwithstanding the provisions of the treaty of peace which undertook to save them. Next were questions of confiscation of estates and debts of loyalists or enemies, under State acts passed while the war for independence was in progress. Back of all these was the question of the liability of a State to suits by individuals in the federal courts. The federal judicial power had been made to extend to cases at law and in equity "between a State and citizens of another State," and "between a State and citizens thereof and foreign

states, citizens, and subjects." It had been very commonly assumed while the question of ratification was pending, that while these provisions would admit of suits *by* the States in the federal courts, it was not their meaning or their purpose to allow the States to be made defendants in the federal courts against their will. The idea of a sovereign state being thus forced to respond to the suits of individuals was abhorrent to the prevailing sentiments of many States, and to the judgments of able men in all sections. Among the States to which such a liability would be particularly obnoxious were Virginia, then first in power, and New York, from its central position and commercial importance, almost equally necessary to the Union.

When the question was presented to the Federal Supreme Court for decision in the fourth year of Washington's administration, we have the recorded opinion of Mr. Randolph, his Attorney-General, that a wide-spreading flame had been kindled in Virginia over the British debts, and that the friends of the general government were far inferior in numbers to its enemies. The fact was equally true of New York. The opposition in the former State was led by Patrick Henry, and in the latter by George Clinton, each a host in himself, and with a strong hold on the popular feeling, acquired by patriotic service in the Revolution. In some other States the opposition to State suability was equally pronounced and aggressive.

A weak court would have bent before the popular fury, and it might easily have done so with assignment of such plausible reasons as would have preserved for it the judicial character. The question was presented in a case which excited intense interest throughout the country,[1] and which was decided at the February term of the court, 1793.

The State of Georgia had been sued in the Federal Supreme Court by the citizen of another State, but had

[1] Chisholm *v.* Georgia, 2 Dallas' Rep., 419.

refused to recognize the jurisdiction, and had protested with no little feeling and vigor against the indignity of being thus brought like a common debtor into court. The protest called in question the national character of the government, and denied sovereignty to the Union. It was true that the Constitution had in the plainest terms declared that the Supreme Court should have original jurisdiction of cases to which a State should be a party with a citizen of another State as adverse litigant, but for the protesting State it was denied that the words, however plain, could be universally applied, or could be so applied at all as to reach the case in question. All provisions of the Constitution, it was said, must be reasonably interpreted, as we must suppose that they were understood by the people who adopted them, and so interpreted, the one in question could mean to give the court jurisdiction of a case between a State and a citizen of another State only when the State itself should voluntarily invoke the jurisdiction. It could never have been intended to give to any court the power by its process to bring a State before it as a delinquent, and the States would never have ratified a Constitution which proposed it. They were sovereign States. They did not resign their sovereignty in ratifying the Constitution, and therefore retained it still. They consented, indeed, to the formation of a federal government with a Federal Supreme Court as a valuable agency in that government. But it is inconsistent with the very nature of sovereignty that a tribunal created as a convenience in government should exercise a superior and controlling power over the sovereign itself to subject it to judgments. This would be to make the agent the master, and that, too, of a sovereign, though, in the nature of things, a sovereign can have no master.

Very slight consideration of this protest is needed to make plain that, if assented to, it placed the Union and its government at the mercy of the several States. If the

States were sovereign in any such sense as they had been before the Constitution, and if the Union was federal and without sovereignty, then nullification of a federal law to which a State objected might well be defended as a constitutional right, and secession of a State as a remedy for supposed wrongs would be perfectly logical. The question which the case presented was therefore one which, as it involved the nature of the Union and the general rules of constitutional construction, far transcended in importance the interests involved in the particular case, or in any number of similar cases which might come before the court. The question, in short, was, whether the Constitution was a bond of national unity, or such federal league only as would be dissoluble at the pleasure of any party to it.

One of the justices of the court planted himself upon the protest of the State as the expression of true constitutional doctrine. Justice Wilson, the ablest and most learned of the associates, took the national view, and was supported by two others. The Chief Justice was thus enabled to declare as the opinion of the court that, under the Constitution of the United States, sovereignty belonged to the people of the United States. When experience disappointed the expectations they had formed of the Confederation, the people in their collective and national capacity established the Constitution. "It is remarkable that, in establishing it, the people exercised their own proper sovereignty, and conscious of the plenitude of it, they declared, with becoming dignity: *We, the people of the United States, do ordain and establish this Constitution.* Here we see the people acting as sovereigns of the whole country, and in the language of sovereignty establishing a Constitution by which it was their will that the States should be bound, and to which the State constitutions should be made to conform." And the deduction was irresistible: the sovereignty of the nation was in the people of the nation, and the residuary sovereignty of each State in the people of each State.

Nothing could be plainer than this opinion; nothing more unequivocal. The people of the United States by sovereign act had formed the Constitution to make more perfect the Union which had existed before. After this clear and authoritative declaration of national supremacy, the power of a court to summon a State before it at the suit of an individual might be taken away by the amendment of the Constitution—as was in fact done—without impairing the general symmetry of the federal structure, or inflicting upon it any irremediable injury. The Union might survive and accomplish the beneficent purposes entrusted to it, even though it might lack the power to compel the States to perform their obligations to creditors. We shall not pause to show—what indeed is self-evident—that the Union could scarcely have had a valuable existence had it been judicially determined that powers of sovereignty were exclusively in the States or in the people of the States severally. Neither is it important that we proceed to demonstrate that the doctrine of an indissoluble Union, though not in terms declared, is nevertheless in its elements at least contained in the decision. The qualified sovereignty, national and State, the subordination of State to nation, the position of the citizen as at once a necessary component part of the federal and of the State system, are all exhibited. It must logically follow that a nation as a sovereignty is possessed of all those powers of independent action and self-protection which the successors of Jay subsequently demonstrated were by implication conferred upon it.

Mr. Jay did not long remain at the head of the federal judiciary, because the country demanded his services in other fields, where the need of them seemed for the time to be more urgent. The value of his labors in negotiating the treaty with Great Britain was so great that the jurist has since been almost forgotten in the diplomatist, but any careful review of the work of the court organized under his leadership must take notice of the fact that he,

first of all, laid down the doctrine which reconciled constitutional State sovereignty with national supremacy and permanent union.

Of his other decisions mention will be made only of one[1] in which was presented the question of the effect of the treaty of peace upon the rights of British subjects to recover debts due to them before the Revolution, but which the States had sequestrated while the war continued. The decision that the sequestration did not prevent recovery by the creditor was in recognition of the great principle that a treaty, like the Constitution itself, is in respect to matters properly embraced in it, the supreme law.

Near the close of the term of President John Adams Mr. Jay was solicited by him to accept a new appointment as Chief Justice. "In the future administration of our country," said the President to him, "the firmest security we can have against the effects of visionary schemes or fluctuating theories will be in a solid judiciary; and nothing will cheer the hopes of the best men so much as your acceptance of this appointment. You have now a great opportunity to render a most signal service to your country." Every word of this was strictly true. But Mr. Jay's career in performing signal services for his country had already been a long one, and he might justly say that as in paying the debt of patriotism he had never stopped to count the cost to himself, or to question in any degree the claims made upon him, he might now without reproach decline to resume the ermine he had once worn so honorably, and leave the dignity with the labor to be taken up by another. It was only after he had declined that the President, with rare perception of fitness, filled the place by the appointment of John Marshall.

Between the time of Mr. Jay's resignation and this appointment the decisions by the court had not been numerous, but some of the cases which have lasting importance it may be worth our while to mention now.

[1] Georgia *v.* Brailsford, 3 Dallas, 1.

One of these was a case in which the amplitude of federal power to levy taxes was asserted and explained, and the meaning of the term "direct taxes," as used in the Constitution, was expounded.[1]

Another was a case in which, in clear and most emphatic terms, was again affirmed the paramount authority of a treaty over State action and State laws.[2]

In another, the meaning of the term *ex-post-facto* law, as used in the Constitution, in forbidding the passing of such laws by the States, was determined, and it was settled that all laws are not *ex post facto* merely because they concern past transactions, but that the term includes only those which are of a criminal nature, and which impose punishments or increase in some way a criminal liability for past conduct. Nor was this all. The opinion was by Mr. Justice Chase, a violent partisan of the federal school, who on some occasions exhibited his partisanship most unbecomingly on the bench; but who, nevertheless, as the organ of the court, gave authoritative utterance to certain principles on the due observance of which State rights must largely depend. These were:

First. That State legislation is to be held presumptively valid at all times, and that the presumption is to be applied even when authority has been exercised which in its nature is judicial.

Second. That the proper authority for determining the validity of State legislation, when no federal question is involved, is not the federal but the State judiciary, whose decision on a purely State question should be accepted and followed.[3]

These are valuable principles, and in point of constitutional law as sound as they are valuable.

This general survey of the federal judicial authority will be concluded here. The Supreme Court has seemed to be gradually gaining in dignity and power with the

[1] Hylton *v.* United States, 3 Dallas, 171.

[2] Ware *v.* Hylton, 3 Dallas, 199. [3] Calder *v.* Bull, 3 Dallas, 386.

growth of the country and of its interests, but its real importance was never greater than at the first. And the judges who occupied the bench before the time of Marshall are entitled to have it said of them that what they did was of incalculable value to representative institutions, not in America alone, but throughout the world. They vindicated the national character of the Constitution; they asserted and maintained the supremacy of the national authority; they made plain for the statesmen as well as the jurists who should come after them the true path of constitutional interpretation; and while doing so, they also justified in the States, as regards purely State questions, the same right of final judgment which they asserted for the Union in respect to questions which were national. From that time on it was reasonably certain that whatever party might be in possession of the government, and however much when out of power, in its conventions and through its leaders, it might have lauded and magnified State rights and State sovereignty, it would, when in possession of power, vindicate the national supremacy against any attempt to nullify it, so that whether a Jackson or a Lincoln should be the head of the government when the trial of the Constitution should come, the utterance of the Executive would be clear and determined, that at all cost and all hazard the national life would be defended and an indissoluble Union be perpetuated.

LECTURE II.

CONSTITUTIONAL DEVELOPMENT IN THE UNITED STATES AS INFLUENCED BY CHIEF-JUSTICE MARSHALL.

By HENRY HITCHCOCK, LL.D.

CHIEF-JUSTICE MARSHALL.

On the tenth day of May, 1884, there was unveiled in the city of Washington, at the western front and almost within the shadow of the Capitol, a noble statue of bronze, upon whose granite pedestal is the inscription:

JOHN MARSHALL,
CHIEF-JUSTICE OF THE UNITED STATES.
ERECTED BY THE BAR AND THE CONGRESS OF THE UNITED STATES, A.D. MDCCCLXXXIV.

The Chief-Justice of the United States presided at the simple but impressive ceremony. In accordance with separate resolutions of both Houses,[1] it was held in the presence of the two Houses of Congress, the chief officers of the various departments of the government, the descendants of Chief-Justice Marshall, and many citizens.

The statue is of heroic size. The Chief-Justice is seated, wearing his robe of office, and in the attitude of delivering a judgment. Strength, dignity, and gentleness are blended in the venerable countenance. Felicitously conceived and admirably executed by the son of a distinguished associate,[2] whose own distinction in art and filial love and reverence for his subject alike designated him for the work, it "represents," in the words of Chief-Justice Waite,[3] "the reverence of the Congress and the Bar of the United States for John Marshall, the Expounder of the Constitution."

It is no disparagement to the eminent and learned men

[1] Senate Report, No. 544, 1st Sess. 48th Congress.

[2] W. W. Story, son of Mr. Justice Story.

[3] See "Proceedings," etc., 112 U. S. Reports, pp. 744, 748.

who shared his labors to say that Chief-Justice Marshall was not only the official head, but by far the most conspicuous and influential member of the Supreme Court during the thirty-four years of his service. In his brief address at the unveiling of the statue Chief-Justice Waite said:

"But before this is done, let me say a few words of him we now commemorate. Mr. Justice Story, in an address delivered on the occasion of his death, speaks 'of those exquisite judgments, the fruits of his own unassisted meditations, from which the court has received so much honor,' and I have sometimes thought even the bar of the country hardly realizes to what extent he was, in some respects, unassisted. He was appointed Chief-Justice in January, 1801, and took his seat on the bench at the following February term. The court had then been in existence but eleven years, and in that time less than one hundred cases had passed under its judgment. . . . In short, the nation, the Constitution, and the laws were in their infancy. Under these circumstances, it was most fortunate for the country that the great Chief-Justice retained his high position for thirty-four years, and that during all that time, with scarcely any interruption, he kept on with the work he showed himself so competent to perform. . . . He kept himself at the front on all questions of constitutional law, and, consequently, his master-hand is seen in every case which involved that subject. . . . Hardly a day now passes in the court he so dignified and adorned, without reference to some decision of his time, as establishing a principle which, from that day to this, has been accepted as undoubted law. . . . And when at the end of his long and eminent career he laid down his life, he and those who so ably assisted him in his great work had the right to say that the judicial power of the United States had been carefully preserved and wisely administered. The nation can never honor him, or them, too much for the work they accomplished."

The Supreme Court Reports show how large was the share of the great Chief-Justice in the labors of those thirty-four years. In the thirty volumes from 1st Cranch to 9th Peters, both inclusive, are reported 1,215 cases,

in 94 of which no opinions were given, and 15 are reported as decided by the court, no judge being named. In the remaining 1,106 cases opinions were filed, and in 519 of these Marshall delivered the opinion of the court, the remainder being unequally divided among the 15 judges who were his associates during that entire period. During the same period dissenting opinions were filed by Marshall in eight cases in all. The most important of these, and the only one involving a constitutional question, was *Ogden v. Saunders*, decided in 1827.[1] From the organization of the court, in 1790, until Marshall's appointment, in 1801, six decisions[2] were rendered involving questions of constitutional law. From 1801 to 1835, sixty-two such decisions were given, in thirty-six of which the opinion of the court was written by Marshall, in the remaining twenty-six by some one of seven other judges.[3] Of his five associates in 1801,[4] increased in 1808 to six,[5]

[1] To these may be added the case of *Rose v. Himely*, decided in 1808, reported 4 Cranch, 241, in which Marshall delivered the opinion of the court: but which, as to the question of jurisdiction under the law of nations, in case of a seizure on the high seas, was overruled in *Hudson v. Guestier*, 6 Cranch, 281. See also *Williams v. Armroyd*, 7 Cranch, 423, and Van Santvoord's Lives of the Chief-Justices, pp. 380–83.

[2] *Chisholm v. Georgia*, reported 2 Dallas, 419. *Hylton v. U. S.*, reported 3 Dallas, 171. *Hollingsworth v. Va.*, reported 3 Dallas, 378. *Calder v. Bull*, reported 3 Dallas, 386. *Fowler v. Lindsey*, reported 3 Dallas, 411. *Cooper v. Telfair*, reported 4 Dallas, 14.

[3] This enumeration is believed to be accurate, though it includes some cases not classified by Judge Curtis under the head of Constitutional Law in the digest to his "Decisions of the Supreme Court, U. S.," and some cases not included in the collection of Chief-Justice Marshall's decisions, published in one volume, in 1839, under the title of "Marshall on the Constitution." In the latter book are also included three constitutional decisions made by him on the circuit: the most important being his opinion on the law of treason at the trial of Aaron Burr, in August, 1807, reported in the appendix to 4 Cranch, p. 470, the other two being the cases of *Brig Wilson v. United States*, reported 1 Brockenbrough, 423, and *United States v. Maurice*, reported 2 Brockenbrough, 96. For a revised index of constitutional decisions of the Supreme Court from 1790 to 1835, see Appnedix I.

[4] Cushing, Paterson, Chase, Washington, Moore.

[5] Todd, J., appointed under Act of February 24, 1807, took his seat at February Term, 1808.

Bushrod Washington alone survived after 1811, his death occurring in 1829.[1]

These details illustrate the relations which the Chief-Justice bore to his associates. It is not strange, in view of his acknowledged intellectual supremacy, the exalted reputation which he had acquired in varied and highly important public service at home and abroad, and his singularly winning personal traits, that the history of his labors during that period should be in so great part the history of the Supreme Court itself.

The work of that court cannot be justly estimated without taking into account the earlier conditions under which it was performed. Not only, in the words of Chief-Justice Waite, "were the nation, the Constitution, and the laws in their infancy," but an absolutely new and momentous problem of political science was to be solved, —whether it was possible to successfully work a scheme contemplating the contemporaneous supremacy, in each of thirteen independent commonwealths, of two governments, distinct and separate in their action, yet commanding with equal authority the obedience of the same people, so that each in its allotted sphere should perform its functions without impediment to or collision with the other.[2] For us, that problem is so completely solved by the experience of a century that few Americans realize what Professor Bryce calls[3] "that immense complexity which startles and at first bewilders a student of American institutions." Its solution depended, in part, upon the interpretation and enforcement of a written constitu-

[1] Of Marshall's six associates at the January Term, 1835, when he sat for the last time, Story and Duval were appointed in 1811, Thompson in 1823, McLean in 1829, Baldwin in 1830, and Wayne in January, 1835.

[2] Patrick Henry, in the Virginia Convention, denounced "these two co-ordinate, interfering, unlimited powers of harassing the community" as "unexampled, unprecedented in history, the visionary projects of modern politicians," and "a political solecism." See Elliot's Debates, Vol. III. (2d ed., 1836), p. 148. For other gloomy forebodings and predictions by him, see *Ib.*, pp. 47–51, 58, 156, 325–8, 436, 546, 549.

[3] The American Commonwealth, Vol. I., Pt. I., Ch. II., p. 14.

tion which, as Mr. Webster said in his argument, and Marshall repeated in his decision, in *Gibbons v. Ogden*,[1] enumerated but did not define the powers which it granted; and thus that scheme assigned to the Supreme Court, as a co-ordinate department of the national government, a part never before undertaken by such a tribunal.

Even if the Federal Constitution, when promulgated for adoption, had been accepted by all parties as theoretically perfect, and its provisions as open to but one construction, still a bitter and all but fatal experience gave warning of the dangers to be apprehended from the local and State jealousies, the selfish and conflicting interests, which even during the struggle for independence had brought the government of the Confederation into contempt.[2] But it was not so accepted. What Von Holst calls "the worship of the Constitution,"[3] was of later growth. "The historical fact is," says that author, quoting a phrase of John Quincy Adams,[4] "that the Constitution had been 'extorted from the grinding necessity of a reluctant people'"[5]; and again:

"We are compelled to say with Justice Story, that we ought to wonder, not at the obstinacy of the struggle of 1787 and 1788, but at the fact that despite every thing, the Constitution was finally adopted. The simple explanation of this is that it was a struggle for existence, a struggle for the existence of the United States."[6]

I need not remind you of the fierce though unsuccessful opposition to it, notably in the Massachusetts, New York, and Virginia Conventions. Of the last, Marshall,

[1] 9 Wheaton, 189.

[2] See 1 Story's Comm. on Const. of U. S., §§ 252, 254.

[3] Von Holst's Constitutional History of the United States, Vol. I., Ch. II., pp. 68–75.

[4] J. Q. Adams' Address, "The Jubilee of the Constitution," delivered in 1839, before the New York Historical Society.

[5] Von Holst's Const. Hist. of U. S.. Vol. I., p. 63.

[6] *Ib.*, p. 62.

then thirty-three years of age, but already a recognized leader of the Virginia bar, was a distinguished member.[1] With the ratification of the Constitution, on June 21, 1788, by New Hampshire, the ninth State, followed by Virginia on June 25th, and New York on July 26th, the Union under the Constitution became an accomplished fact. But it was carried by dangerously narrow majorities,—in the New York Convention by only 30 votes to 27, in that of Virginia by 89 to 79, and in that of Massachusetts by 187 against 168.[2] It has been said [3] that if submitted to popular vote it would have been rejected. The objections to its adoption, the gloomy apprehensions of despotism as its result, are forcibly summed up by Mr. Justice Story in his Commentaries,[4] and one of these was, that the powers of the judiciary were far too extensive.

For the time, these doubts and fears were overborne by the tide of rejoicing which swept over the country when its ratification was assured.[5] But history records that it was "with an aspect grave almost to sadness, and with a voice deep and tremulous" that Washington, after taking the oath of office as President, on April 30, 1789, addressed to the two Houses of the first Congress those solemn words: "The preservation of liberty and the destiny of the republican model of government are justly considered as deeply, perhaps as finally, staked on the experiment entrusted to the American people." [6]

It was soon apparent that "the more the legal consolidation of the Union became an accomplished fact, the greater was the reaction of particularistic tendencies against the increased

[1] For Marshall's speeches in the Virginia Convention in defense of its provisions concerning taxation, the militia, and the judiciary, see 3 Elliot's Debates (2d ed., 1836), pp. 222, 419, 551.

[2] Fiske's Critical Period of American History, pp. 331, 338, 344.

[3] Bryce, The American Commonwealth, Vol. I., p. 223.

[4] Vol. I., §§ 297, 298.

[5] Fiske, Critical Period, etc., p. 339.

[6] Bancroft, Hist. Const. U. S., Vol. II., p. 363.

pressure. The mere fact of the adoption of the Constitution could not at once change the real state of affairs or the modes of thought of the people." [1]

The arena was changed: the conflict between the centrifugal and centripetal forces remained. Party lines were soon and sharply drawn between those who held "mistrust of the government to be the corner-stone of freedom," [1] and those who saw in its supremacy and strength the only hope of escape from anarchy and civil war. Years afterward, Marshall himself, in his Life of Washington, described the conflict as one by which the whole country was

"divided into two great political parties, the one of which contemplated America as a nation, and labored incessantly to invest the federal head with powers competent to the preservation of the Union. The other attached itself to the State governments, viewed all the powers of Congress with jealousy, and assented reluctantly to measures which would enable the head to act, in any respect, independently of the members." [2]

The strife between Federalists and Anti-Federalists, presently known as Republicans, was raging fiercely before Washington's first term as President was half through. The measures, the men, the events at home and abroad, which were its occasion or its pretext, belong to political history; but in connection with them soon emerged, in the debates of Congress, in the wrangles of the press, and the vituperative arguments of political pamphleteers, questions of constitutional right and power. Each party more and more invoked the provisions or the omissions of the Constitution in support of its own measures or in condemnation of those of its opponents.

Justice Story, in 1833, appropriately dedicated to Chief-Justice Marshall his "Commentaries on the Constitution"

[1] Von Holst, Const. Hist. U. S., Vol. I., p. 83.
[2] Marshall's Life of Washington, Vol. V., p. 33.

"as to one whose youth was engaged in the arduous enterprises of the Revolution, whose manhood assisted in framing and supporting the Constitution, and whose maturer years have been devoted to the task of unfolding its powers and illustrating its principles."

As these words imply, Marshall's public life and services began long before his appointment as Chief-Justice. His earlier fame as soldier, lawyer, legislator, diplomatist, and statesman has been, for later generations, completely overshadowed by his greatness in that office. And yet those earlier labors were in fact the necessary preparation for that greatness.

In May, 1775, at the outbreak of the Revolution, Marshall, then nineteen, was a lieutenant, in 1777 a captain, in the patriot army,[1] in which he served more than five years. He was engaged in the battles of Great Bridge, Iron Hill, Brandywine, Germantown, and Monmouth, serving also under Major Lee at Powles Hook, and under "Mad Anthony Wayne" in his daring and successful assault at Stony Point. He shared with conspicuous cheerfulness and patience the sufferings and privations at Valley Forge, where his singularly sweet and serene temper made him the idol of his comrades, who regarded him, says a contemporary, as not only brave, but signally intelligent, and constantly appealed to him as the arbiter of their disputes.[2] Often employed as Judge-Advocate, he became personally acquainted with Washington, and also with Alexander Hamilton, then a member of Washington's staff, whose unreserved friendship he afterwards enjoyed, and of whose consummate ability and inestimable public services as soldier and statesman he held the highest opinion.[3]

In 1780, after attending a course of law lectures by Chancellor Wythe, at William and Mary College, he was

[1] Story's Discourse, etc., Miscell. Writings, pp. 647, 648. Flanders' Lives of the Chief Justices, Vol. II., pp. 286–300.

[2] Van Santvoord's Lives of the Chief Justices, pp. 309, 310.

[3] Story's Discourse, Miscell. Writings, p. 648.

admitted to the bar, and, after a few months more of active service in the army, began the practice of law in 1781, at first at his home in Fauquier County, Virginia, but removing to Richmond about the time of his marriage in 1783. He rose rapidly to distinction, not by the arts of the advocate, for he had neither melody of voice, nor grace of gesture, nor elegance of style, but by sheer intellectual force,—by an extraordinary clearness and penetration of mind and power of condensed statement, and by what William Wirt long afterwards described [1] as

"one original and almost supernatural faculty—the faculty of developing a subject by a single glance of his mind, and detecting at once the very point on which every controversy depends. No matter," adds Wirt, "what the question, though ten times more knotty than the gnarled oak, the lightning of Heaven is not more rapid nor more resistless than his astonishing penetration. . . . All his eloquence consists in the apparently deep self-conviction and emphatic earnestness of his manner, the correspondent simplicity and energy of his style, the close and logical connection of his thoughts, and the easy gradations by which he opens his lights on the attentive minds of his hearers."

Never seeking public station, often declining it, Marshall's great popularity repeatedly charged him with its duties. Early in 1782 he was elected to the Legislature, in 1783 was chosen a member of the State Executive Council, and was again elected to the Legislature in 1784, in 1787, from 1788 to 1792, and without his knowledge and against his will in 1795. To this period,[2] Mr. Justice Story tells us, is to be referred the development of the political opinions and principles which governed his subsequent life, and which Marshall himself summed up, in a letter written long afterwards, in saying:

"The general tendency of State politics convinced me that no safe and permanent remedy could be found but in a more

[1] "The British Spy," pp. 178–181. Flanders, Vol. II., p. 305.

[2] Discourse, etc., Story's Miscell. Writings, pp. 649, 651, 656–8, 662–7.

efficient and better organized government;" and again: "The questions which were perpetually recurring in the State Legislatures, . . . which proved that every thing was afloat, and that we had no safe anchorage ground, gave a high value in my estimation to that article in the Constitution which provides restrictions on the States."

He was not a member of the Philadelphia Convention in 1787; but when the Constitution was submitted to the States, in 1788, he was (the same letter adds) "a determined advocate for its adoption," and became a candidate for the Virginia Convention. A majority of the voters of his county were opposed to it, and he was warned of strenuous opposition unless he would pledge himself to vote against it; but he promptly refused, and by a triumphant majority was elected a member of perhaps the ablest and most illustrious body ever assembled in that State.

Patrick Henry, then at the height of his fame, led the attack upon the Constitution, seconded by Grayson, Monroe, Mason, and other advocates of State sovereignty, and opposed by Madison, Randolph, Wythe, Pendleton, Marshall, and other men of note, and during twenty-five days of keen and powerful debate the issue was in doubt. To Henry's passionate denunciations of the new "consolidated government," as based on principles "extremely pernicious, impolitic, and dangerous," by which "all pretensions to human rights and privileges are rendered insecure, if not lost," and to his strenuous objections to many of its provisions,[1] Marshall replied in three speeches, defending the provisions of the Constitution concerning taxation, the militia, and the judiciary,[2] which drew from Henry the tribute of his "highest veneration and respect," and an acknowledgment of his "candor on all occasions."[3] It is interesting to note Marshall's view that under the Constitution, as proposed, a State could not be sued by a

[1] Elliot's Debates, Vol. III., p. 44.
[2] *Ib.*, pp. 222, 419, 551.
[3] *Ib.*, p. 578.

citizen of another State,[1] and his emphatic assertion (foreshadowing his opinion in *Marbury v. Madison* fifteen years later) of the right and duty of the federal courts to declare void a legislative act not warranted by the Constitution.[2]

In the political conflicts which followed the adoption of the Constitution, the courage, the personal influence, and the great ability of Marshall became still more conspicuous. The Anti-Federalists, under the lead of Patrick Henry and his associates, though narrowly defeated in the Convention, controlled the politics of Virginia. Notwithstanding the veneration felt for Washington, and his unanimous election to the presidency, in no State was his administration more harshly criticised, as well in the Legislature as by the Democratic societies, which, modelled after the French Jacobin clubs,[3] sprung up all over the country in 1793.

In spite of his earnest desire and efforts to withdraw from public life, Marshall soon found himself an acknowledged leader of the Federalists, and prominent in the discussion of national affairs, for which abundant and exciting material was at hand. The news of the war between England and the French Republic in 1793, promptly responded to by Washington's proclamation of neutrality, was contemporaneous with the arrival of the new French Minister, Genet, whose audacious intrigues quickly bore fruit in partisan clamor and international complications, including even the unlawful fitting out of privateers in American ports, and the seizure of British ships by French men-of-war in American waters. The proclamation was

[1] "It is not rational to suppose that the sovereign power shall be dragged before a court. The intent is to enable States to recover claims of individuals residing in other States." 3 Elliot's Debates (2d ed., 1836), p. 555.

[2] "If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void." *Ib.*, p. 553.

[3] McMaster's History, etc., Vol. II., pp. 96–107.

furiously denounced, both as an ungrateful return for the assistance of France during our own Revolution, and as an unconstitutional exercise of power by the President; and the violence of partisan attacks upon the administration was exceeded only by the virulence of the libels which charged Washington with plotting to make himself king.[1] Marshall boldly defended the proclamation, though denounced as an aristocrat and an enemy of republican principles, and at a public meeting in Richmond carried resolutions approving it. In 1795, the ratification of Jay's treaty with England added fuel to the flame. Bitterly denounced by the Republicans everywhere,[2] both for its commercial features and for its alleged unconstitutionality, it was so odious in Virginia that the friends of Marshall, who, against his own remonstrance, had again been elected to the Legislature, urged him, for the sake of his own influence, if not his personal safety, to take no part iu the legislative debates on that subject.[3] Resolutions had been adopted by a public meeting in Richmond, at which Chancellor Wythe presided, declaring the treaty "insulting to the dignity, injurious to the interests, dangerous to the security, and repugnant to the Constitution of the United States." But Marshall, with characteristic courage, determined, as he afterwards wrote, "to make the experiment, however hazardous it might be." A meeting was called,

"Which," he adds, "was more numerous than I had ever seen at this place, and after a very ardent and zealous discussion which consumed the day, a decided majority declared in favor of a resolution that the welfare and honor of the United States required us to give full effect to the treaty negotiated with Britain."

More than this, he compelled its opponents in the Legislature to completely abandon their objections to its consti-

[1] McMaster's History, etc., Vol. II., pp. 96–107; 109–112.

[2] *Ib.*, pp. 221–30.

[3] Story's Discourse, etc., Miscell., pp. 667, 668.

tutionality, by an argument of overwhelming power, admitted on all sides to be conclusive, and "the fame of which," says Story,[1] "spread through the Union, enhancing the estimate of his character even with his political enemies."

In 1796 his professional reputation became national in connection with his first argument in the Supreme Court of the United States, in the celebrated case of *Ware v. Hylton*,[2] known as the British debt case. The question involved, and which excited intense interest and bitter controversy in Virginia and other States, was whether, under the Treaty of Peace of 1783, British creditors could recover debts sequestrated during the Revolutionary War by an Act of the State Legislature. Marshall appeared for the losing side, but a contemporary relates[3] that he "was followed by crowds, and courted with every evidence of admiration and respect for the great powers of his mind."

Washington soon after offered him the position of Attorney-General, and subsequently the mission to France, as successor to Mr. Monroe, both which he declined. But in 1797 he reluctantly accepted, from a sense of public duty, an appointment by President Adams as one of three Envoys-Extraordinary to France, Gerry and Pinckney being his associates, to renew negotiations, the failure of which had brought the two countries to the brink of open war. Their mission was unsuccessful. Marshall himself, in his Life of Washington,[4] records with grave indignation "the open contumely and undisguised insult suffered by the United States in the persons of their ministers," whom Talleyrand in vain attempted alternately to browbeat and to cajole into the payment not only of tribute but of a bribe. The publication in the United States of the masterly official dispatches prepared by Marshall,[5] while arousing universal indignation, greatly

[1] Story's Discourse, etc., Miscell., p. 668.
[2] 3 Dallas, 199.
[3] Kennedy's Life of Wirt, Vol. II., p. 76.
[4] *Ib.*, Vol. V., p. 633.
[5] Story's Discourse, etc., Miscell., p. 670.

increased his reputation. His return home in June, 1798, was literally an ovation. At a public dinner given in his honor by members of both Houses of Congress was proposed the sentiment, instantly repeated everywhere: "Millions for defence, not a cent for tribute." [1]

Gladly returning to professional duties, he was again reluctantly drawn into public life. At the earnest solicitation of Washington, to whom the aspect of public affairs gave the deepest concern,[2] he consented to become a candidate for Congress,—declining, for that reason, an offer by President Adams of a seat in the Supreme Court, as successor to Judge Wilson. An excited canvass resulted in his election, in spite of calumnies and personal attacks so gross as to call forth a letter from Patrick Henry [3] warmly supporting him as "far above any competition." He had scarcely taken his seat, in December, 1799, when the melancholy duty devolved upon him of announcing to the House the death of Washington; and the resolutions adopted on his motion, though written by another, contained the well-known tribute to him who was "First in war, first in peace, and first in the hearts of his fellow-countrymen." [4]

This session of Congress witnessed the final struggle of the Federal party for supremacy. Elected as a Federalist, Marshall nevertheless, in accordance with views announced during the canvass, voted to repeal the obnoxious clauses of the Sedition Law. But when the great debate took place upon Livingston's resolutions censuring the President, in terms almost equivalent to impeachment, for directing the surrender to the British Government of Nash, *alias* Robbins, upon the charge of mutiny and murder on the high seas on board a British man-of-war, it was Marshall who vindicated him by a speech [5] which admitted no reply, and which, says Story, "at once placed him in

[1] Van Santvoord's Lives, etc., p. 338.

[2] *Ib.*, pp. 339, 340.

[3] Flanders, Vol. II., pp. 387, 388.

[4] *Ib.*, p. 393.

[5] This speech is reprinted in the Appendix to 5th Wheaton's Reports, note 1; also in Wharton's State Trials, p. 443.

the front rank of constitutional statesmen, silenced opposition, and settled forever the points of national law upon which the controversy hinged."[1] Nash claimed to have been an American citizen, unlawfully impressed from an American brig, and that the murder with which he was charged occurred in the attempt to regain his freedom. This was false, but it had excited great popular sympathy, and gave color to the most vehement partisan attacks,[2] under the plea of protection to American citizens and resistance to executive encroachments upon the constitutional right of trial by jury. But Marshall, with characteristic simplicity and power, distinguished the functions of the judiciary and the executive under the Constitution, demonstrating the duty of the latter to execute treaty obligations, and pointing out that in directing Nash's surrender if satisfactory evidence of the murder should be adduced, the sufficiency of the evidence, both as to the citizenship and the alleged crime, was submitted entirely to the judge.[3] This speech, it is said, was the only one ever revised by Marshall for publication. It is probably the best example of his forensic style, and well illustrates William Wirt's remark, in a letter to a young friend,[4] "Marshall's maxim seems always to have been: 'Aim exclusively at strength.'"

In May, 1800, upon the disruption of President Adams' Cabinet, he appointed Marshall Secretary of War, an appointment wholly unexpected, and which the latter wrote to decline; but the Secretary of State also resigning, he was appointed to and accepted that position. His term of office was short, but his great powers were again displayed in the dignified and skilful conduct of negotiatiations of great importance[5] with France, England, and

[1] Story's Discourse, etc., Miscell., p. 672.

[2] McMaster's History, Vol. II., pp. 446, 447.

[3] 5 Wheaton's Reports, Appendix, note 1, pp. 31, 32.

[4] Letter to F. W. Gilmer, Kennedy's Life of Wirt, Vol. II., p. 76.

[5] Van Santvoord's Lives, etc. (Marshall), p. 347; Magruder's Life of Marshall (American Statesmen Series), Ch. ix., pp. 149–153

Spain, especially the two former, involving grave questions of neutral and treaty rights, of contraband, blockade, and impressment, of British and Tory claims and ante-revolutionary debts. His instructions on these subjects to Mr. King, our Minister to England, are held to rank among the ablest of American state papers.

With such preparation, John Marshall, at the age of forty-six, entered upon a judicial career to which, it is not too much to say, no other in history affords a parallel. On the 31st day of January, 1801, his nomination by President Adams to the Senate having been unanimously confirmed, he was commissioned Chief-Justice of the Supreme Court of the United States.

That court had now existed eleven years; but the solution of the great and underlying problems of the government under the new Constitution had scarcely begun. Six cases involving constitutional questions had been determined. Two of these related to one of the gravest of those problems; but the later one only registered the prompt reversal of the former by an amendment to the Constitution.

In July, 1792, the writ issued by the Supreme Court against the State of Georgia, at the suit of Alexander Chisholm, a citizen of South Carolina, to compel the payment of a private claim, was returned duly served upon the Governor and Attorney-General. No response being made at the August Term, the court, in order "to avoid every appearance of precipitancy,"[1] postponed the plaintiff's motion for judgment by default until the February Term, 1793. Great excitement and alarm arose throughout the Union.[2] Every State was burdened with debts, enormous for those times.[3] Maryland, Massachusetts, and New York had also been sued

[1] 2 Dallas, 419. [2] See *Cohens v. Virginia*, 6 Wheaton, 406.

[3] Pitkin states that those of Massachusetts and South Carolina amounted to more than ten millions and a half, and those of the other States together were estimated at between fourteen and fifteen millions. Pitkin's History of the United States, Vol. II., p. 341.

by individuals in the Supreme Court,[1] and one of the objections most angrily urged in 1788 by the opponents of the Constitution,[2] but denied by its advocates as unfounded,[3] was now threatened to be made good. In December, 1792, the Legislature of Georgia passed resolutions flatly denying the obligation of the State, either to answer the process or to obey the judgment of the court. In February, the court, with one dissenting voice, and against the solemn protest in writing of the State, asserted its jurisdiction. A year later it rendered judgment by default, and ordered an inquiry of damages.[4] To this the Legislature of Georgia responded by a statute, denouncing the penalty of death against any one who should presume to enforce any such process within its jurisdiction.[5] But the threatened collision never came. The plaintiff prudently awaited the result of the constitutional amendment already proposed in the Senate, which passed both Houses without debate, and was ratified by the State Legislatures: and in *Hollingsworth v. Virginia*, in 1798,[6] the court, declaring the Eleventh Amendment to have been constitutionally adopted, renounced "any jurisdiction, in any case, past or future, in which a State was sued by the citizens of another State, or by citizens or subjects of any foreign state."[7]

In 1799 another phase of that question was presented, when it was held, in *Fowler v. Lindsey*,[8] that the fact that the land demanded in a suit between individuals was granted by and is claimed under a State, does not make

[1] *Van Stophorst v. Maryland*, 2 Dallas, 401; *Oswald v. New York*, 2 Dallas, 401, 415. Pitkin states that a suit was also commenced by an individual against the State of Massachusetts in the summer of 1793. History of the United States, Vol. II., p. 335.

[2] As by George Mason in the Virginia Convention, 3 Elliot's Debates, p. 526, 527.

[3] As by Hamilton in *The Federalist*, No. 81; and by Marshall in the Virginia Convention, 3 Elliot's Debates, p. 555.

[4] 2 Dallas, 480.

[5] 2 Schouler's History of the United States, p. 274.

[6] 3 Dallas, 378. [7] 3 Dallas, 378, 382. [8] 3 Dallas, 411.

the State a party to the suit, although the State may be interested in, or consequentially affected by, the decision. This highly important distinction was afterwards elucidated with great force by Marshall,[1] and only four years ago was the turning-point of the well-known "Virginia coupon cases."[2]

In *Hylton v. United States*,[3] in 1796, it was held that a federal tax on carriages was not a direct tax, and therefore not required by the Constitution to be apportioned among the States according to the census. Seventy years later the federal income tax was held valid on the same ground.[4]

In *Calder v. Bull*,[5] in 1798, it was held that the clause of the Constitution prohibiting the States to pass *ex post facto* laws, related only to penal and criminal proceedings, and that a retrospective law of Connecticut, affecting property rights only, and violating no contract, was valid.

In *Cooper v. Telfair*,[6] in 1800, an Act of the Georgia Legislature passed in 1782, banishing the plaintiff in error from that State and confiscating his property, was held not repugnant to the Constitution of the State.

In the last two cases no decision was necessary, nor rendered, whether the court had power to declare void a law contrary to the Constitution. Such a power had already been asserted by the Superior Court of Rhode Island, under its colonial charter, in 1786, in the case of *Trevett v. Weedon*,—which Judge Cooley cites[7] as the first instance of such a decision. It had been maintained with great force and clearness by Hamilton, in *The Federalist*,[8] and asserted both by Marshall and Patrick Henry in the Virginia Convention,[9] and was probably

[1] *Osborn v. U. S. Bank*, 9 Wh. 846–859.

[2] See the opinion of Matthews, J., in *Poindexter v. Greenhow*, 114 U. S., 296.

[3] 3 Dallas, 171.

[4] *Pacific Ins. Co. v. Soule*, 7 Wallace, 433, 444.

[5] 3 Dallas, 386.

[6] 4 Dallas, 14.

[7] Constitutional Limitations, p. 160, note 3.

[8] *The Federalist*, No. LXXVIII (J. C. Hamilton's Ed., 1864).

[9] Elliot's Debates (2d Ed.), pp. 325, 553.

sustained by the general opinion of the profession. Still, these two cases show [1] that it was regarded as still unsettled; and, as we shall see, it remained for Marshall to establish, once for all, the logical necessity of such a power under a written constitution, by demonstrating the absurdity of any other theory.

Hayburn's case,[2] in 1792, well illustrates the extreme caution, not to say humility, of the federal judges at that date. In 1791 Congress passed an Act concerning invalid pensions, directing the United States Circuit Courts to pass upon such claims, but their decisions to be revised by the Secretary of War and by Congress—in other words, making those courts a mere pension bureau, subordinate both to the executive and legislative departments. The judges all agreed, the judiciary being a co-ordinate department of the government, that the Act was unconstitutional; but their action was very different from that of

[1] In *Calder v. Bull* (3 Dallas, 392), Mr. Justice Chase was "fully satisfied" that the Supreme Court had no jurisdiction to declare void a State law contrary to the Constitution of such State, but declined to express an opinion whether it could declare void an Act of Congress contrary to the Federal Constitution. Justices Cushing and Paterson, though concurring in the decision given, did not discuss this question. Mr. Justice Iredell said (3 Dallas, 399): "If any Act of Congress, or of the Legislature of a State, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority but in a clear and urgent case." In *Cooper v. Telfair*, decided at February Term, 1800, Mr. Justice Chase said (4 Dallas, 19): "Although it is alleged that all Acts of the legislature, in direct opposition to the prohibitions of the Constitution, would be void, yet *it still remains a question, where the power resides, to declare it void.* It is, indeed, a general opinion, it is expressly admitted by all this bar, and some of the judges have, individually, in the circuits, decided that the Supreme Court can declare an Act of Congress to be unconstitutional and therefore invalid; but there is no adjudication of the Supreme Court itself upon the point." This probably refers to *Van Horne v. Dorrance*, in which, on the Pennsylvania Circuit, at April Term, 1795, Mr. Justice Paterson said, in an elaborate charge to the jury (2 Dallas, 308): "Whatever may be the case in other countries, yet in this there can be no doubt that every Act of the Legislature, repugnant to the Constitution, is absolutely void."

[2] 2 Dallas, 410.

the Supreme Court in 1851, in dismissing a like case.[1] In the New York Circuit, Chief-Justice Jay, Justice Cushing, and District Judge Duane made an order setting forth their reasons for declining to act as a court, but declaring that the "objects of this Act are exceedingly benevolent, and do real honor to the humanity and justice of Congress," and that, desiring to manifest their "high respect for the National Legislature," they would execute it individually as commissioners. In the Pennsylvania Circuit, Justices Wilson and Blair and District Judge Peters addressed an apologetic letter to the President, declining to act, for like reasons, but assuring him that this duty was "far from pleasant," and "excited feelings in us which we hope never to experience again." In the North Carolina Circuit, Justice Iredell and District Judge Sitgreaves addressed to him a still more elaborate letter deploring their "painful situation," and the "lamentable difference of opinion" which brought them "under the indispensable necessity of acting according to the best dictates of our own judgment"; but promising to keep the court open for five days, as required by the Act, in order to receive applications, though they could not act even as commissioners unless upon further consideration they should change their minds. At the August Term, 1792, the question came directly before the Supreme Court, on the Attorney-General's motion for a mandamus requiring the Circuit Court to act upon Hayburn's petition for a pension. But though every judge on the bench had made up his mind, the court took the motion under advisement; and in February, 1793, Congress made different provision for such claims.

It is clear that before Marshall's time there was nothing like the modern estimate of either the dignity, the value, or the rightful authority of the federal judiciary. The reasons are obvious. It was the most novel feature of a novel political system, jealously denounced by its oppo-

[1] *The United States v. Ferreira*, 13 Howard, 40; see pp. 49–52.

nents [1] as not only a dangerous intrusion upon the province of the State courts, but a standing menace to the State governments. Its defenders, including Hamilton in *The Federalist*,[2] contended, with far more reason, that the federal judiciary was "beyond comparison the weakest of the three departments." Not only the extent and limits of its powers were yet to be determined, but the still more vital question whether they would be sustained by a sober and law-abiding public opinion; for such courts, as De Tocqueville has said, "are the all-powerful guardians of a people which respects law, but they would be impotent against popular neglect or popular contempt." [3] Before 1788, the nearest approach to a federal court were the Committee of Appeals appointed by the Congress in 1777, and its successor, the Court of Appeals, established in 1780, under the ninth of the Articles of Confederation. But in 1778, when the Committee of Appeals reversed the judgment of the Pennsylvania Court of Admiralty in the case of the Sloop *Active*, condemned as prize, not only its decision but a writ of injunction issued to enforce it was contemptuously disregarded by the State officials, with no more serious consequences to them than an entry on the minutes of the Committee that they would hear no more appeals until their authority should be settled, and the solemn adoption by Congress of resolutions deprecating such insubordination by any State. Thirty years later the authority of the Committee of Appeals was affirmed, and the rights of the appellants in that same controversy enforced, by the Supreme Court of the United States.[4]

[1] See Henry's and Mason's speeches in the Virginia Convention, 3 Elliot's Debates (2d ed., 1836), pp. 325, 521, 522; also Marshall's reply, pp. 553 *et seq.*

[2] *The Federalist*, No. LXXVIII. (J. C. Hamilton's Ed., 1864), p. 576.

[3] "Democracy in America" (H. Reeve's translation, ed., 1875), Vol. I., p. 149.

[4] See opinion of Marshall, C. J., in *United States v. Peters*, 5 Cranch, 115; also that of Paterson, J., in *Penhallow v. Doane's Administrators*, 3 Dallas, 82–85, in which this controversy is referred to. See also the interesting summary of it in the Life of Chief-Justice Ellsworth, by Van Santvoord, Lives of the Chief-Justices, etc., pp. 201–4.

It would, however, be a mistake to suppose that even in its earliest years the new tribunal failed to command respect. John Jay was its first Chief-Justice, and among his associates were Cushing of Massachusetts, Ellsworth of Connecticut, Wilson of Pennsylvania, Iredell of North Carolina,—all selected by Washington, all eminent for ability and public service. But for some years the volume of its business was so small that Chief-Justices Jay and Ellsworth found time to serve as foreign ministers while retaining their commissions: and a recent historian states that so little did its deliberations attract public attention that the room where its terms were held in Philadelphia for ten years, prior to its removal to Washington in 1801, is not positively known at this day.[1]

It would be idle, in a paper like this, to attempt even a summary of Marshall's constitutional decisions. I can only indicate some of the more important principles which they establish, with such reference to cases as time permits.

The first question, in order of time, and perhaps in importance, was as to the power of the court to declare void an Act of Congress repugnant to the Constitution: which was determined in *Marbury v. Madison*, at the February Term, 1803.[2]

The nomination of Marbury by President Adams to a judicial office having been confirmed by the Senate, his commission was made out, signed, and sealed, but had not been transmitted to him; and Mr. Madison, Secretary of State under Jefferson, refused to deliver it. The office being one not subject to removal by the President, Marbury claimed that his title to it was complete, and made application directly to the Supreme Court, under the thirteenth section of the Judiciary Act, for a writ of mandamus commanding the Secretary to deliver the commission.

[1] Schouler's History of the United States, pp. 273, 274. [2] 1 Cranch, 137.

It was unanimously held, in an opinion by the Chief-Justice:

That when the commission was signed and sealed the appointment was complete, and vested in Marbury a legal right to the office:

That to withhold his commission was violative of that legal right; for which wrong a writ of mandamus, if issued by a court of competent jurisdiction, was the appropriate legal remedy:

But that the provision of the Judiciary Act purporting to give the Supreme Court jurisdiction, in a proceeding original and not appellate, to issue writs of mandamus to public officers, was not warranted by the Constitution, and was therefore inoperative and void, and the application must be refused.

To us, these propositions are no more novel or sensational than is the idea of specific gravity, or the 47th proposition of Euclid; though it is said that Pythagoras celebrated the demonstration of the one by the sacrifice of a hecatomb, and that upon his accidental discovery of the other Archimedes ran through the streets, half naked and wild with delight, crying, "Eureka!"

Yet Mr. Justice Miller, in his historical address upon the Supreme Court, dwells upon the immense importance of a decision which subjected the ministerial and executive officers, all over the country, to the control of the courts, and whose application to the very highest officers of the government, except perhaps the President himself, has often been illustrated. In fact, its assertion or its denial makes just the difference, as Marshall tersely said in that opinion, between "a government of laws and a government of men."

But the doctrine that it is the right and duty of the courts to declare void a law repugnant to the Constitution, lies at the very root of our system of government. Marshall's demonstration of it is so characteristic of his mode of reasoning that a brief extract may be allowed.

"The question," said the Chief-Justice,[1] "whether an Act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States; but happily not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

"That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. . . . This original and supreme will organizes the government, and assigns to different departments their respective powers. . . . The powers of the legislature are defined and limited, and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if those limits may, at any time, be passed by those intended to be restrained? . . . The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative Acts, and, like any other Acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative Act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. . . .

"If an Act of the legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem at first view an absurdity too gross to be insisted upon. It shall, however, receive a more attentive consideration.

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts

[1] 1 Cranch, 176–8.

must decide on the operation of each. . . . This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary Act of the legislature, the Constitution, and not such ordinary Act, must govern the case to which they both apply.

"Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution and see only the law.

"This doctrine would subvert the very foundation of all written constitutions. It would declare that an Act which, according to the principles and theory of our government, is entirely void, is yet in practice completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such Act, notwithstanding the express prohibition, is in reality effectual. . . . It is prescribing limits and declaring that those limits may be passed at pleasure.

"That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction."

This unanswerable reasoning applies to every written constitution under which there exists an independent judiciary and a legislature with limited powers; and it is as much the duty of the lower as of the higher courts, in every case within their jurisdiction, to reject, as no law, a supposed law not warranted by that constitution. But in applying it, Marshall was as careful not to overstep the limits of judicial duty as he was fearless in fulfilling it, repeatedly holding that the courts ought never "on slight implication and vague conjecture" to pronounce an Act of the legislature void, nor "unless upon a clear and strong conviction of its incompatibility with the Constitution." [1]

This unique feature of our system has attracted, perhaps

[1] See *Fletcher v. Peck*, 6 Cranch, 128; *Dartmouth College v. Woodward*, 4 Wheaton, 625.

more than any other, the attention of thoughtful students. Such a power does not pertain to the courts of England, because Parliament is omnipotent. It can change, has changed,[1] in vital respects, the British Constitution; which, indeed, is not a constitution, as we understand the term, but, as well described by Professor Bryce, "merely a mass of law, consisting partly of statutes and partly of decided cases and accepted usages, in conformity with which the government of the country is carried on from day to day, but which is being constantly modified by fresh statutes and cases."

De Tocqueville admiringly dwelt upon this power,[2] pointing out its limits, but declaring that, "within these limits, the power vested in the American courts of justice, of pronouncing a statute to be unconstitutional, forms one of the most powerful barriers which has ever been devised against the tyranny of political assemblies."

These limits are precisely what make it a judicial and not a political power,—a distinction which Marshall always and strongly maintained. They are—that it can be exercised only in a litigated case; that its direct force is spent in determining the rights of the parties to that case; and that unless and until a case has arisen for judicial determination, it cannot be invoked at all.[3]

It follows, that questions purely political, or which are by the Constitution and laws committed to either the executive or legislative discretion, are not within the province of the courts.[4] The line was sharply drawn, when Marshall held,[5] in 1804, that the commander of a public armed vessel, sued for the illegal seizure of private property, was liable in damages for the trespass, though he was acting under the direct instructions of the President.

[1] 1 Blackstone's Commentaries, p. 161.

[2] Democracy in America, (ed. 1875), Ch. VI., pp. 94–100.

[3] *Osborn v. U. S. Bank*, 9 Wheaton, 819.

[4] See *Marbury v. Madison*, 1 Cranch, 170; *McCulloch v. Maryland*, 4 Wheaton, 421, 423; *Foster v. Neilson*, 2 Peters, 307.

[5] See *Little v. Barreme*, 2 Cranch, 170.

Nor is it true that the courts, as has been sometimes said, in thus declaring the law, themselves control the legislature. With the wisdom or the expediency of a statute the courts have nothing to do, nor with its probable effect, except as an aid to its correct construction.[1] Their sole concern is, whether it is a valid exercise of legislative power. If it be, they must enforce it; if not, they must reject it,—not as being a bad law, but as a counterfeit. "The judicial department," said Marshall, in *Osborn v. U. S. Bank*,[2] "has no will, in any case.... Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the law." In *Fletcher v. Peck*,[3] he rebuked an attempt, in a suit on a private contract, between individuals, to collaterally impeach a legislative Act as having been corruptly passed, as being an inquiry "indecent in the extreme"; but he proceeded to hold that Act void, because it impaired the obligation of a contract.

Questions indeed arise, and of the greatest moment, in which the brevity, the broad sweep, even the absence, of express constitutional provisions may compel the courts to resort to general rules of construction,[4] in order that the existence of alleged powers may be determined from the Constitution as a whole, from its manifest spirit and intent, and from the circumstances[5] under which and the purposes for which it was framed. Concerning the application of these rules, the wisest and most upright judges may differ. Hence the controversy, familiar throughout our political history, as to the duty of a strict or a liberal construction. But with the people still remains the final word, the ultimate appeal, whenever the gravity of the occasion requires. And the self-imposed checks and

[1] See *U. S. v. Fisher*, 2 Cranch, 386, 389, 390; and *McCulloch v. Maryland*, 4 Wheaton, 423.

[2] 9 Wheaton, 866.

[3] 6 Cranch, 131.

[4] See *Bank of U. S. v. Deveaux*, 5 Cranch, 87.

[5] See *Cohens v. Virginia*, 6 Wheaton, 387, 388.

delays of the Constitution are but obstacles, as James Russell Lowell has happily said,[1] "in the way of the people's whim, not of their will."

The advantages of such a system are obvious. It commands respect and obedience to the mandates of the Constitution, by substituting for the discussion of abstract theories of government, and for dangerous conflicts between officers of state or aspirants for power, the deliberate adjudication of concrete rights by an impartial tribunal, invoked not at the will of the judge but at the demand of the parties concerned. That it has also disadvantages is true: notably, the uncertainty which may exist in respect of important questions until the opportunity for deciding them has arisen or is availed of. But I may not further pursue this interesting theme.[2]

The efficiency of the judicial power under the Constitution being thus demonstrated, what was its extent? To what cases or controversies did it apply? In technical phrase,—what jurisdiction was conferred upon the Federal courts under the Constitution and the laws made in pursuance thereof; especially touching matters with which the State governments were or might be concerned?

It was inevitable that the extreme advocates of State rights should try conclusions with the national authority, as administered in the Federal courts. This was attempted, now by State enactments in disregard of their decisions, and again by the refusal of State courts to acknowledge the supervisory power of the Supreme Court; the Eleventh Amendment to the Constitution, prohibiting suits by a citizen against a State, being in either case relied on.

The first collision grew out of that legacy from the feeble days before the Constitution, the prize case of the

[1] Democracy, and other Addresses (1887), p. 24.

[2] This subject is elaborately and most ably considered by Professor Bryce in *The American Commonwealth*, Vol. I., Chapters XXIII., XXIV., pp. 236–70.

sloop *Active*, already mentioned,[1] which took new shape in the case of *The United States v. Peters*, decided in 1809, now seldom mentioned, but involving issues lying at the very foundation of later and more famous judgments.

This vessel was condemned, in 1777, by the Pennsylvania Admiralty Court, as prize to an armed vessel of that State, overruling an adverse claim by Gideon Olmstead and others. The Committee of Appeals, in Congress, reversed this judgment, granting to the claimants an injunction forbidding the State marshal to account for the proceeds to the State court; in contempt of which the money was paid by the marshal to the State judge in 1778 and by him delivered to the State Treasurer, Rittenhouse, who invested it in loan certificates, which after his death in 1801 were still held by his daughters as executrixes of his estate. In January, 1803, the claimants obtained, in the United States District Court of Pennsylvania, a personal judgment for these proceeds against Rittenhouse's executrixes, and were about to enforce it; when the Pennsylvania Legislature passed an Act, claiming the money for the State, denying the jurisdiction of the court and the validity of its judgment, and directing the Governor to protect the persons and property of Rittenhouse's representatives against any process of any Federal court issued against them. Renewed efforts for a settlement having failed, the Attorney-General, in 1808, applied to the Supreme Court of the United States, in Olmstead's behalf, for a writ of mandamus commanding the district judge to enforce the judgment. After the fullest consideration, it was granted. The opinion of the Chief Justice left no doubt either as to the nature or the gravity of the real issue. He said:[2]

[1] Also known as the Olmstead case. The earlier facts are briefly stated in the opinion of Marshall, C. J., in *U. S. v. Peters*, 5 Cranch, 137; and a full account of the matter is given in Hildreth's History of the United States, Vol. III., Chap. XXII., pp. 155–164.

[2] *United States v. Peters*, 5 Cranch, 136.

"If the legislatures of the several States may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery ; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all, and the people of Pennsylvania as well as the citizens of every other State must feel a deep interest in resisting principles so destructive of the Union and in averting consequences so fatal to themselves."

To the argument that the Federal courts were deprived of jurisdiction in the case by the Eleventh Amendment, he replied :

"The amendment simply provides that no suit shall be commenced or prosecuted against a State. The State can not be made a defendant to a suit brought by an individual. But it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one State against citizens of a different State where a State is not necessarily a defendant."

Thus backed by the Supreme Court, the district judge issued his writ. The attempt to serve it was obstructed by the bayonets of an armed guard which, under the Governor's orders, was placed around the houses of the respondents by General Bright, commanding a brigade of Philadelphia militia. The United States Marshal proceeded to summon a *posse comitatus* of two thousand men, but gave time for reflection. Great public excitement ensued. The legislature passed another Act, which opened a door for retreat. The Governor's remonstrance and appeal to President Madison to interfere was met by firm and fit refusal. The writ was served without violence, the State authorities gave way, and the money was paid over. But the national authority was still more completely vindicated. General Bright and his men were promptly arrested, indicted, and tried in the United

States Circuit Court, for unlawful resistance to civil process. Upon the facts specially found by a reluctant and sympathizing jury, plainly sharing the intense popular sympathy and excitement, but firmly held to their duty by Mr. Justice Washington, they were adjudged guilty. The sentence of fine and imprisonment imposed was executed in part, but the President wisely remitted the rest, on the ground that the prisoners had acted on a mistaken sense of duty.

Another phase of the controversy was presented when the Virginia Court of Appeals, in 1813, unanimously denied the supervisory jurisdiction, and refused to obey the mandate, of the Supreme Court, in the case of *Martin v. Hunter's Lessee*, which involved the validity of a land title protected by a treaty. On a second writ of error, argued in 1816, the Supreme Court unanimously affirmed its jurisdiction in a masterly opinion by Mr. Justice Story;[1] but while enforcing its own judgment avoided further controversy with the Court of Appeals by declaring void the judgment of that court and valid that of the inferior Virginia court in favor of the title.

But this vital question was again presented in 1821, in the great case of *Cohens v. Virginia*.[2] On that occasion the opinion of the Supreme Court was delivered by the Chief-Justice. His fame might well rest on that magnificent argument alone.

The case was a simple one. The Cohens were indicted in the Sessions Court of Norfolk for selling lottery tickets in Virginia, contrary to a State statute. Their defence was, that the lottery was established and the tickets issued by the city of Washington, under authority of its charter granted by Congress; but it was overruled, and a fine of $100 imposed. The Sessions court being the highest State court having jurisdiction of the case, they sued out a writ of error from the Supreme Court of the

[1] *Martin v. Hunter's Lessee*, 1 Wheaton, 304, 323, 362.

[2] 6 Wheaton, 264.

United States under the 25th section of the Judiciary Act. The counsel for Virginia moved to dismiss the writ, for want of jurisdiction, on three grounds: that a State was made a defendant contrary to the Eleventh Amendment; that no writ of error lay in any case from the Supreme Court to a State court; and that neither the Constitution nor any law of the United States had been violated by the judgment complained of: in support of which a most elaborate and ingenious argument was made.

The opinion of the court fills nearly sixty printed pages. Its opening paragraph is a most impressive example of Marshall's extraordinary power of terse and luminous statement, and his method of exposing and destroying fallacies by reducing them to their simplest terms and then inexorably deducing from them fatal conclusions.[1]

Those brief and solemn sentences also reveal his profound conviction, not only that the Constitution is the supreme law of the land, but that its provisions were designed and are ample to maintain its supremacy. Said the Chief-Justice:[2]

"The questions presented to the court by the first two points made at the bar are of great magnitude, and may be truly said vitally to affect the Union. They exclude the inquiry whether the Constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review; and maintain that, admitting such violation, it is not in the power of the government to apply a corrective. They maintain that the nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made by a part against the legitimate powers of the whole; and that the government

[1] Mr. Webster once said to Justice Story:—"When Judge Marshall says, '*It is admitted*,'—Sir, I am preparing for a bomb to burst over my head and demolish all my points." (Story's Life and Letters, Vol. II., p. 505.)

[2] *Cohens v. Virginia*, 6 Wheaton, 377.

is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the Constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the courts of every State in the Union. That the Constitution, laws, and treaties, may receive as many constructions as there are States; and that this is not a mischief, or, if a mischief, is irremediable. These abstract propositions are to be determined; for he who demands decision without permitting inquiry, affirms that the decision he asks does not depend on inquiry.

"If such be the constitution, it is the duty of the court to bow with respectful submission to its provisions. If such be not the constitution, it is equally the duty of this court to say so; and to perform that task which the American people have assigned to the judicial department."

Step by step he proceeds, with perfect courtesy, but with remorseless logic, to rend asunder the network of technical argument with which it was sought to fetter the judicial power. Distinguishing the two great classes of jurisdiction under the Constitution, one arising from the character of the parties, regardless of the controversy, while the other depends on the nature of the controversy without regard to the parties, and comprehends, without exception, "all cases in law and equity arising under the Constitution, laws, and treaties of the United States"; and quoting the express provision that—

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding"—he continues—

"This is the authoritative language of the American people; *and, if gentlemen please, of the American States.* It marks with lines too strong to be mistaken, the characteristic distinction

between the government of the Union and those of the States. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the Constitution; and if there be any who deny its necessity, none can deny its authority."

Thus, in a single phrase, he laid bare the pith and kernel of the controversy, or rather, of a question no longer open to judicial controversy. That flash of grave and delicate irony,—"*and, if gentlemen please, of the American States*,"—was it a reminiscence of the great debate in the Virginia Convention, thirty-three years before?—when Patrick Henry, speaking of the framers of the Constitution, passionately demanded,—

"Who authorized them to speak the language of *We, the people*, instead of *We, the States?* States are the characteristics and the soul of a confederacy. If the States be not the agents of this compact, it must be *one great consolidated, national government of the people of all the States.*"

The counsel for Virginia relied much on the Eleventh Amendment.[1] But the Chief-Justice replied that this was not *a suit against the State*, but a prosecution by the State, to which a defence under the laws of the United States was set up; and that the writ of error merely removed the record into the supervising tribunal, in pursuance of Cohens' constitutional right to have their defence re-examined there.[2]

But, it was argued, the supervisory jurisdiction claimed for the Supreme Court is not needed, and could not have been intended. Are not the State legislatures and the State courts bound by solemn oath to support the Constitution? It would be most "unjust and injurious" to suppose them capable of perjury. Even if that supposition could be entertained, such a jurisdiction would be

[1] See Mr. Barbour's argument, 6 Wheaton, pp. 305–8; also Mr. Smyth's argument, *ib.*, p. 315.

[2] 6 Wheaton, p. 411.

altogether inadequate. Whenever the States shall be determined to destroy the Federal Government, they can quietly and effectually accomplish the purpose *by not acting*. The legislatures need only to refuse to appoint senators and presidential electors, and then, said the counsel for Virginia, "the executive department, and part of the legislative, ceases to exist, and the Federal Government thus perishes by a sin of omission, not of commission."[1]

Thus boldly were foreshadowed the revolutionary tactics of the secessionist leaders in February, 1861. In the fierce light of those later days, the reply of the Chief-Justice reads like a prophecy. Admitting that such extreme cases might occur,—

"We cannot help believing," he said, "that a general conviction of the total incapacity of the government to protect itself and its laws in such cases would contribute in no inconsiderable degree to their occurrence."

How that warning recalls to us President Buchanan's despairing message of December 3, 1860! On one page a laborious argument for the perpetuity of the Union under the Constitution, on the next the humiliating conclusion that although "its framers never intended to plant in its bosom the seeds of its own dissolution," yet they had failed to delegate to the Executive or to Congress the power to coerce a single seceding or rebellious State! Compare with this the noble and inspiring words of the great Chief-Justice.[2]

"A constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen, indeed, if they have not provided it, as far as its nature will permit, with the means of self-preservation from

[1] Mr. Barbour's argument, 6 Wheaton, pp. 309–312.

[2] 6 Wheaton, 387–9.

the perils it may be destined to encounter. . . . It is very true that whenever hostility to the existing system shall become universal, it will also be irresistible. The people made the Constitution, and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make or to unmake resides only in the whole body of the people ; not in any subdivision of them. The attempt of any of the parts to exercise it *is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it.* . . . The framers of the Constitution were indeed unable to make any provisions which should protect that instrument against a general combination of the States, or of the people, for its destruction ; and, conscious of this inability, they have not made the attempt. But they were able to provide against the operation of measures adopted in any one State, whose tendency might be to arrest the execution of the laws ; and this it was the part of true wisdom to attempt. *We think they have attempted it.*"

So thought the people of the United States in 1861. Upon the very lines laid down by Marshall, their supreme and irresistible power repelled, for the preservation of the whole, the usurpation attempted by a part. Once for all, the pernicious heresies of secession and State sovereignty were rejected and cast out. But the successors of Marshall still firmly maintain that sound and wholesome theory of State rights, by which the supremacy of the nation and the autonomy of the States, each in its own sphere, are alike recognized as essential to our complex system of government.[1]

I shall briefly refer to other decisions in which the restrictions upon the States were considered from a different point of view. But no other, I think, affords a more splendid example of Marshall's intellectual power, his profound political insight, or his unalterable devotion to

[1] See Mr. Justice Miller's address on "The Supreme Court," delivered at Ann Arbor, June 29, 1887, and his opinion in the *Slaughter House Cases*, 16 Wallace, 82 ; also Chief-Justice Waite's opinion in *Texas v. White*, 7 Wallace, 725.

the Union. His usually simple and earnest style here rises to an uncommon dignity and strength. The stately calm of judicial reasoning scarcely veils the patriotic emotion whose powerful current was swelled, we may well believe, by thronging memories of the long and anxious struggle for national existence in which, as soldier, legislator, statesman, he had borne his part against oppression from without and the more threatening dangers of anarchy from within.

Intimately connected with the question of the reserved powers of the States was that as to the extent of the powers granted to Congress by the Constitution,—a question which (as Marshall said)[1] "is perpetually arising, and will probably continue to arise as long as our system shall exist."

In the case of *The United States v. Fisher*,[2] decided in 1804, the inquiry was, whether under an Act of Congress providing for the settlement of accounts of receivers of public money, the preference given to the United States over other creditors of an insolvent debtor was valid; in other words, whether Congress had power so to provide. The United States Circuit Court (Pennsylvania District) held that it had not. Whether this was correct depended upon the proper construction of that brief but comprehensive enumeration of the powers of Congress in Article I., Section 8, of the Constitution. In reversing that judgment the Chief-Justice laid down a general rule of construction of the highest importance, best stated in his own brief words:

"It has been truly said that under a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised. It is claimed under the authority to make all laws which shall be *necessary and proper* to carry into execution the powers vested by the Constitution in the government of the United States, or in any department or officer thereof.[3]

[1] *McCulloch v. Maryland*, 4 Wheaton, 405.

[2] 2 Cranch, 358.

[3] U. S. Constitution, Art. I., Sec. 8.

"In construing this clause it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary, because the end might be obtained by other means. *Congress must possess the choice of means*, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution."[1]

In the very important case of *McCulloch v. Maryland*, decided in 1819, the question arose as to the constitutional power of Congress to charter the United States Bank. This power the Chief-Justice affirmed in one of his most elaborate and celebrated opinions, admiringly referred to by Chancellor Kent in the text of his Commentaries.[2] He there stated the rule in these words:

"We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. *Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.*"[3]

But while sustaining the power, the court expressly declined to pass upon the expediency of its exercise, further saying:

[1] 2 Cranch, 396.

[2] Chancellor Kent says: "A case could not be selected from the decisions of the Supreme Court of the United States, superior to this one of *McCulloch v. Maryland*, for the clear and satisfactory manner in which the supremacy of the laws of the Union have been maintained by the court, and an undue assertion of State power overruled and defeated."—1 Kent's Commentaries (12th ed.), p. 428.

[3] 4 Wheaton, 421.

"Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power." [1]

This vital distinction Marshall constantly maintained.[2]

In a later case Marshall applied the same general rule of construction in a very striking and characteristic way. It is matter of history that when Mr. Jefferson, in 1803, purchased the Louisiana territory from France, his own belief was that he had (in his own words) "done an act beyond the Constitution"; and he was not only anxious that the acquisition of Louisiana should be sanctioned, and the future annexation of Florida authorized, by an amendment to the Constitution, but privately submitted to his party friends the draft of such an amendment;[3] though in his message to Congress, submitting the treaty for ratification, he did not mention the constitutional difficulty. But the popularity of the measure secured the ratification of the treaty and all necessary legislation to enforce it, without further question. Twenty-five years later, the question was presented in the Supreme Court, in *The American Insurance Company v. Canter*,[4] with reference to the validity and effect of the treaty of 1819, by which Spain had ceded Florida to the United States. Marshall answered it in these brief words:

[1] 4 Wheaton, 423.

[2] It is of interest to observe that in the highly important case of *Juilliard v. Greenman* (110 U. S. Rep., 421, Mr. Justice Field dissenting), by which, in March, 1884, was finally confirmed the constitutionality of the Legal Tender Act, the conclusions reached by the court are in great part based upon the reasoning of Chief-Justice Marshall in these cases of *The United States v. Fisher* and *McCulloch v. Maryland*, both as to the extent of the implied powers of Congress and as to the absence of judicial control over legislative discretion.

[3] See Randall's Life of Jefferson, Vol. III., pp. 69–81.

[4] 1 Peters, 511, 542.

"The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or by treaty."

I shall again refer to the general principles of construction adopted by Marshall; but something remains to be said upon the closely allied subjects already mentioned,—the powers granted to Congress by the Constitution, and the restrictions which that instrument imposes upon the States.

These restrictions are of two kinds,—those implied in the grant of power to Congress by Section 8, and those expressly declared in Section 10 of Article I. of the Constitution.

Nearly one half, and some of the most famous, of Marshall's constitutional decisions relate to these subjects. The controversies they determined were few, though important; but they established fundamental principles, to which, in a vast number and variety of subsequent cases, scattered through ninety-four volumes of Reports, the court has steadily adhered.[1]

In *McCulloch v. Maryland*, decided in 1819, *Osborn v. Bank of United States*, in 1824, and *Weston v. Charleston*, in 1829,[2] the general principle was established that the States have no power, by taxation or otherwise, to impede, burden, or in any manner control any means or measures adopted by the government for the execution of its powers. In the case first mentioned, the State of Maryland had imposed a stamp duty upon the circulating notes of a bank chartered by the United States to assist in carrying on its fiscal operations. In the second, the

[1] See Mr. Justice Lamar's remarks in *Kidd v. Pearson*, decided October 22, 1888, affirming the constitutionality of the Iowa Prohibitory Act, in 128 U. S. Reports, pp. 1, 16. The valuable treatise by C. Stuart Patterson, Esq., of the Philadelphia bar, on Federal Restraints on State Action, recently published, gives a summary of such decisions up to 1888.

[2] Reported in 4 Wheaton, 316; 9 Wheaton, 738; and 2 Peters, 449.

State of Ohio had imposed an annual tax of $50,000 upon each office of discount and deposit maintained by that bank in the State. In the third, a municipal tax was imposed upon stock of the United States owned by citizens of Charleston, South Carolina. In the first two cases, the counsel for the States attacked the constitutionality of the bank charter as vigorously as they defended the State law; but it was sustained upon the fullest consideration, as within the implied power of Congress to select whatever means, consistent with the letter and spirit of the Constitution, it might deem necessary and proper for the purposes of the government. This being established, the tax was in each case held unconstitutional on the ground,[1]—

"that the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create. . . . If the States may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make the government dependent on the States. . . . The question is, in truth," (said the Chief-Justice) "a question of supremacy; and if the right of the States to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation."

Perhaps none of Marshall's opinions more strikingly illustrates, not only what Wirt called his "almost supernatural faculty" of detecting at once the very point of a controversy, but his instinctive grasp of the general principles and remoter consequences which it involved. This

[1] 4 Wheaton, 431–3.

is that power of generalization which has achieved the most splendid triumphs of modern science; which revealed to Newton, in the falling apple, the secret of the harmonious movements of the spheres; and which, from Faraday's discovery that an electrical disturbance is excited by waving a magnet near a coil of wire, has deduced the laws of that mysterious electro-magnetic force whose ministry to human wants is among the marvels of our time.

In *Osborn v. The Bank of the United States*, the Eleventh Amendment was again fully considered. It was again held [1] that the criterion of a suit against a State was, whether the State was a party to the record; on the ground, in part, that if the jurisdiction were held to depend, not upon that plain fact, but upon the supposed or actual interest of the State in the result of the controversy, no rule was given by the Constitution by which that interest could be measured. This controversy is perhaps not yet finally determined; but it is beyond my province to discuss the recent cases in which delicate and difficult questions have arisen as to how far a suit against individual defendants, who are made such solely because of alleged duties incumbent upon them, or wrongs committed by them, exclusively in the character of State officers, is to be considered a suit against the State. This distinction was recognized by Marshall himself, in the case of *The Governor of Georgia v. Madrazo*, decided in 1828,[2] and in various forms has been the turning-point of recent cases of great importance.[3]

The case of *Gibbons v. Ogden*, decided in 1824,[4] followed by *Brown v. Maryland*, in 1827,[5] and *Wilson v. Blackbird Creek Marsh Company*, in 1829,[6] presented ques-

[1] 9 Wheaton, 852, 853. [2] 1 Peters, 110.

[3] *Davis v. Gray*, 16 Wall. 203; *Board of Liquidation v. McComb*, 92 U. S. 531; *United States v. Lee*, 106 U. S. 196; *Louisiana v. Jumel*, 107 U. S. 711; *Antoni v. Greenhow*, 107 U. S. 769; *Virginia Coupon Cases*, 114 U. S. 269–340; *Hagood v. Southern*, 117 U. S. 52.

[4] 9 Wheaton, 1. [5] 12 Wheaton, 419. [6] 2 Peters, 245.

tions whose importance, great even then, has been immensely increased by the unparalleled development of the internal commerce of this country.

They involved the construction of that clause of Section 8 of Article I of the Constitution which confers on Congress power "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

The grant of this power to Congress, in exchange for the concessions made in respect of slavery, was one of the three great compromises between northern and southern interests, in the Convention of 1787, but for which its labors would have come to naught.[1] Long afterwards, Mr. Madison, in his Introduction to its Debates, referring to the "dissatisfaction and discord" growing out of the commercial relations of the States, said,[2]—

"New Jersey, placed between Philadelphia and New York, was likened to a cask tapped at both ends, and North Carolina, between Virginia and South Carolina, to a patient bleeding at both arms."

In terms, this power is perfectly explicit. The question was,—Is it exclusive in the general government, or concurrent with the States?

In *Gibbons v. Ogden*, an injunction, granted by Chancellor Kent, was sustained by the highest appellate court of New York, restraining Gibbons from navigating the Hudson River with steamboats, duly licensed for the coasting trade under the Act of Congress, on the ground that he was thereby infringing the exclusive right, granted by the State of New York to Robert Fulton and Livingston and by them assigned to Ogden, to navigate all the waters of that State with vessels moved by steam. The argument excited universal interest, for it was a battle of giants. Webster and William Wirt, then Attorney-General, at-

[1] See Fiske's Critical Period, etc., pp. 262-8: Bancroft's History of the Constitution, Vol. II., pp. 151, 157, 161, 162.

[2] The Madison Papers (Vol. V. of Elliot's Debates), ed. 1845, p. 112.

tacked, and Emmett and Oakley defended, before Chief-Justice Marshall and his associates, a State law which Chancellor Kent and his associates had upheld as constitutional.[1] I can but briefly summarize the grounds on which the State law was held void.

Commerce, said the Chief-Justice,[2] (in substance) is not merely traffic; it includes commercial intercourse between nations and parts of nations, in all its branches. It must include navigation, not only because from the beginning, all have understood it, and Congress has legislated, in that sense, but because other provisions of the Constitution imply that intent; and it includes all vessels, whether carrying passengers or freight, whether propelled by wind or steam. The power to regulate commerce is the power to prescribe the rule by which it is to be governed, whether it be carried on between the United States and foreign nations or among the several States; and this power, as vested in Congress, is complete in itself, acknowledging no limitations other than those prescribed in the Constitution. Whether, if Congress has not exercised this power, and until it should do so, any State might have exercised it, is needless now to inquire; because Congress has exercised it by laws now in operation. This power of Congress must be exclusive, for such a power cannot be exercised at the same time by Congress and by a State. In this, it differs from the power of taxation, which may at the same time be exercised over the same persons, by different authorities, for different purposes. So, inspection laws, quarantine laws, and the like, may be enforced by the States, consistently with this power of Congress; for their purpose is not to regulate commerce, but to protect the public health and comfort; and though such laws may remotely affect commerce among the

[1] An interesting account of this case is given in Van Santvoord's Lives of the Chief-Justices, pp. 412–18; see also Kennedy's Life of Wirt, Vol. II., p. 142. Chancellor Kent in his Commentaries (Lect. XIX., Vol. I, pp. 433, 438), gives the reasons for the decision of the State court; from which it appears that they did not differ from the Supreme Court as to the powers of Congress, but as to whether the Act of Congress under which the coasting license was issued, was a regulation of commerce.

[2] 9 Wheaton, 189–198.

States, and the means of executing them may nearly resemble commercial regulations, this does not prove that they flow from the same power. Moreover, the power of Congress to regulate commerce, either with foreign nations or among the States, does not stop at the jurisdictional lines of the States, but must necessarily be exercised within their territorial jurisdiction, and must include every case of commercial intercourse which is not a part of the purely internal commerce of a single State.

Upon these general lines the decision rests; but no summary can do justice to its exact definitions or its accurate criticism of constitutional and statute provisions. He alone can realize how vast is the reach, how great the beneficence, of these principles, who has formed some adequate conception of the enormous commerce now peacefully conducted among these States, and also of the local jealousies, the commercial rivalries, the mutually destructive and retaliatory legislation,[1] the bitter "discord and dissatisfaction," which all but rent asunder those infant commonwealths of a hundred years ago.[2] The Inter-State Commerce Act is the most recent legislative application of those principles. In the latest judicial construction of that Act, Mr. Justice Lamar, delivering

[1] For a striking statement of these, see Fiske's Critical Period, etc., pp. 62, 142–147.

[2] On this subject Mr. Justice Miller says, in his address on the Supreme Court (Ann Arbor, June, 1887): "Scarcely a session of the Supreme Court of the United States has passed within the last twenty-five years in which some case has not been brought before it wherein the validity of laws passed by the States of the Union, or ordinances of municipalities made under the authority of some State law affecting commerce, has not been brought up and controverted, and become the subject of serious consideration. . . . And the cases to which I have referred as coming before the Supreme Court of the United States are ample evidence of what the States would now do, if they had the power, in crippling the inter-state commerce of this country by imposing burdens upon its exercise; and the efforts of the States, endeavoring to shift the burden of taxation from their own shoulders and impose it on the property, rights, and interests of others, would only end in the destruction of the Union and the total suppression of the free and valuable commerce now carried on between the States."

the opinion of the Supreme Court, quotes largely from "that great opinion" of Chief-Justice Marshall in *Gibbons v. Ogden*.[1]

In *Brown v. Maryland*, the question was of the validity of a State law requiring an importer to pay a State license tax on foreign imported goods before being permitted to sell them. It was held void,[2] both as in conflict with the powers of Congress under the decision in *Gibbons v. Ogden*, and as a duty upon imports such as prohibited by the Constitution. The principles then established have been adhered to under a variety of forms in many and important cases subsequently arising.

But in 1829, in *Wilson v. Blackbird Creek Marsh Co.*, a State law was held valid which authorized a dam across a creek navigable from the sea within the ebb and flow of the tide, on the ground that it was not in conflict with any Act passed by Congress. This would seem to imply that the power of Congress to regulate commerce is exclusive only when exercised—a question not decided in *Gibbons v. Ogden*. A like construction had already been placed upon the power of Congress to pass uniform bankrupt laws in the important case of *Sturges v. Crowninshield*, decided in 1819, when it was held[3] that until Congress exercised that power the States were not forbidden to pass a bankrupt law, provided such law contained no principle in violation of the express prohibitions imposed upon them by the tenth section of the first article of the Constitution—for example, that concerning the obligation of contracts, which was the great question in that case. This proposition has never since been questioned. But Mr. Justice Miller, in his address already referred to, speaks of the proposition, that in the absence of the exercise of that power by Congress the States may enact regulations affecting inter-state commerce in

[1] See Mr. Justice Lamar's opinion in *Kidd v. Pearson*, (decided October 22, 1888), 128 U. S. Rep. pp. 16, 17.

[2] 12 Wheaton, 419.

[3] 4 Wheaton, 196.

a class of cases local in character, as one upon which the court was long divided, until a substantial unanimity was reached in recent decisions.[1]

Under the same general head fall the cases of *Cherokee Nation v. Georgia*, decided in 1831, and *Worcester v. Georgia*, in 1832—cases of great interest, but to which I can barely allude. In the former, the Cherokee nation, in the latter a missionary, residing among them, sought the protection of the Supreme Court against penal laws by which Georgia asserted her jurisdiction over the territory and the tribe. My limits forbid even the statement of this remarkable controversy, which fills a curious page in our political history. It must suffice here to say that in the former the complainant's bill for an injunction was dismissed on the ground that the Cherokee nation, though a separate tribe or nation, was not "a foreign State" within the meaning of the Constitution, and the court had therefore no jurisdiction of such a suit, whatever might be the merits of the case. Said the Chief-Justice:[2]

"If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future."

But in *Worcester v. Georgia*, when a citizen of the United States appealed from a sentence of imprisonment under those penal laws of Georgia, no doubt was left either as to the jurisdiction or as to the views of the court. In an opinion which is a masterpiece of historical criticism as well as of constitutional exposition, Marshall[3] held that the Cherokee nation was a distinct community,

[1] The recent decisions referred to are those in *Wabash R'y Co. v. Illinois*, 118 U. S. Rep. 557; *Fargo v. Michigan*, 121 U. S. 230; *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S. 326, in which various State laws were held void as imposing taxes upon inter-state commerce.

[2] 5 Peters, 20.

[3] 6 Peters, 543, 561.

occupying its own territory, in which the laws of Georgia could have no force—the whole intercourse between the United States and that nation being vested, by our Constitution and laws, in the government of the United States; and that the law of Georgia under which Worcester had been imprisoned was a nullity.[1]

Under the second general head of express restrictions upon the States are found some of Marshall's most celebrated decisions, especially those which involved the sanctity of contracts.

To this class belong the cases of *Fletcher v. Peck*, *New Jersey v. Wilson*, *Sturges v. Crowninshield*, *Ogden v. Saunders*, *Trustees of Dartmouth College v. Woodward*, and the later case of *The Providence Bank v. Billings*, in which last the just powers of the States were as carefully guarded as their abuse was restrained in the former.

Conspicuous among the evils which led to the framing of the Constitution were laws passed by the various States, enabling debtors to disregard their contracts with impunity. Madison[2] says that in the internal administration of the States the violation of contracts had become familiar. Hamilton, in an early number of *The Federalist*,[3] dwelt upon it as not only mischievous to individuals, but as a source of hostility between the States themselves, and Marshall,[4] in several important decisions, refers to the

[1] The result of this controversy is a matter of political history. The executive took no steps to enforce this decision, and Worcester was released only after making terms with the State. See Kennedy's Life of Wirt, Vol. II., Chaps. XV. and XIX.; also Bryce's American Commonwealth, Vol. I., pp. 262.

The question of the Indian title to lands on the continent, the nature of the right of conquest, and the ownership of the soil by the United States, were discussed by Marshall in the case of *Johnson v. McIntosh*, 8 Wheaton, 543, which, though not involving a constitutional question, ranks among his most important decisions. See Kent's Commentaries, Vol. I., pp. 257–9; *ib.*, Vol. III., p. 379.

[2] Introduction to the Debates in the Convention, Elliot's Debates, Vol. V., p. 120.

[3] No. VII., *The Federalist* (J. C. Hamilton's ed. 1864), p. 89.

[4] See *Sturges v. Crowninshield*, 4 Wheaton, 202; *Dartmouth College v. Woodward*, 4 Wheaton, 628, 629. In *Ogden v. Saunders* (12 Wheaton, 354,

great and notorious evils and dangers which it had caused. A bitter experience had taught the framers of the Constitution that such laws, in undermining private and public faith, were sapping the foundations of society.

The terms of the prohibition are brief and explicit: "No State shall pass any law impairing the obligation of contracts."

But how was it to be interpreted? Does the term "contract" include an agreement already executed, or only an agreement for the future? What is meant by "the obligation of a contract?" Is it impaired by an insolvent or bankrupt law which discharges the debtor, or by any and what changes in the remedies provided for the collection of debts?

These and other grave questions were answered as they arose by laying down broad principles, since applied by the courts in an immense number and variety of important cases.

In *Fletcher v. Peck*, decided in 1810,[1] it was held that the term *contract* includes equally those agreements which have been and those which are yet to be executed; that a grant or conveyance is simply an executed contract, the obligation of which still continues, binding the grantor not to reassert the right which he has himself extinguished. "It would be strange," said the Chief-Justice, going, as usual, to the root of the matter, "if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected."[2] It was further held that the clause in question made no distinction between States and individuals. From these premises it followed that the rights acquired under a law of the State of

355), Marshall said: "The power of interfering with contracts had been used to such an excess by the State legislatures as to break in upon the ordinary intercourse of society and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse and to threaten the existence of credit, but to sap the morals of the people and destroy the sanctity of private faith."

[1] 6 Cranch, 87, 135–40. [2] 6 Cranch, 136, 137.

Georgia, granting certain lands absolutely to an individual, could not be divested by a subsequent law, which was accordingly held void.

In *New Jersey v. Wilson*, decided 1812, the facts were these. In 1758 the Delaware Indian tribe released to the State of New Jersey their claim to certain lands, in consideration of which the State passed an Act authorizing the purchase of another tract on which the Indians should reside, and expressly providing that this tract should never be taxed. In 1801 the Indians sold and conveyed this tract to individuals, in pursuance of another Act, authorizing them to do so, but which said nothing about taxing the lands thereafter. In 1804 a third Act was passed, imposing a tax on these lands against the new owners. This Act the Supreme Court held void, as impairing the obligation of the original contract with the Indians in the Act of 1758, to the benefit of which the purchasers from them were held entitled.

In the Dartmouth College case,[1] decided in 1819, the same principles were applied to the grant of franchises contained in the charter of a private corporation; a law of New Hampshire being held void, by which the governing power of Dartmouth College was in effect taken from the corporation and assumed by the State.

This is one of Marshall's most celebrated decisions. It is often cited as the one which established the inviolability of contracts under the Constitution. But the actual controversy, as the Chief-Justice remarked,[2] turned, not so much upon the true construction of the Constitution, in the abstract, as upon its application to the case, and upon the true construction of the charter of Dartmouth College; whether that was a grant of political power which the State could resume or modify at pleasure, or a contract for the security and disposition of property bestowed in trust for charitable purposes. It was held the

[1] *Trustees of Dartmouth College v. Woodward*, 4 Wheaton, 518.
[2] 4 Wheaton, 629.

latter,[1] and for that reason inviolable; a question which called forth the noblest eloquence of Webster and of Wirt,[2] as well as the great powers of Marshall, while Story's concurring opinion exhausted the learning of the subject.[3]

But in the case of *The Providence Bank v. Billings*, decided in 1830,[4] it was held that a law of Rhode Island, imposing a tax upon a bank chartered by that State, was valid. Being a State bank, it could not claim immunity under the doctrine of *McCulloch v. Maryland;* and since the charter contained no provision exempting it from taxation, no contract could be implied from the mere grant of corporate franchises that the bank should not be required to bear its portion of the public burden, equally with individual citizens. The power of taxation being vital to the existence of the State government, its abandonment cannot be presumed in any case where no such purpose appears.[5]

Another phase of the question was presented in *Sturges v. Crowninshield*, decided in 1819,[6] in which the question was of the validity of a State insolvent law. In an admirably reasoned and conclusive opinion by the Chief-Justice, all the judges concurring, it was held that until the power to pass uniform bankrupt laws was exercised by Congress, the States were not forbidden to pass a bankrupt law, provided it violated no restriction contained in the tenth section of the first article of the Constitution; but that the New York law under consideration, which, upon surrender of his property as prescribed,

[1] 4 Wheaton, 644.

[2] See an interesting account of this argument, quoted from Mr. Choate's eulogy upon Webster, in Van Santvoord's Lives of the Chief-Justices, pp. 394–398. [3] 4 Wheaton, pp. 667–714. [4] 4 Peters, 514.

[5] But such a contract, expressly contained in a charter of a private charitable corporation, has been upheld, though not without dissent, in comparatively recent decisions of the Supreme Court. *Home of the Friendless v. Rowse; Washington University v. Rowse*, 8 Wallace, 430, 439.

[6] 4 Wheaton, 122.

released the debtor from all liability for any prior debt, was, so far as such debts were concerned, a law impairing the obligation of contracts, and was void. Said the Chief-Justice:

"A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day; and this is its obligation. Any law which releases a part of this obligation must, in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid and entirely discharges it." [1]

At the same time, the substantial distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation, was clearly recognized; and it was held that so long as the obligation of a contract be not impaired, the remedy may be modified as the wisdom of the nation shall direct. The principle which the framers of the Constitution intended to establish was the inviolability of contracts, and this was to be protected in whatever form it might be assailed; but it would be impossible to enumerate beforehand every case to which that principle might apply. The general principle thus laid down has never been departed from, though, in many subsequent cases, its application to new and varying circumstances has often been difficult and doubtful.

The question took another shape in *Ogden v. Saunders*, decided in 1827.[2] This case involved the only constitutional question upon which the majority of the court ever differed from the Chief-Justice. The difference, in brief, was this. The majority of the court held[3] that the municipal law in force when a contract is made is part of

[1] 4 Wheaton, 197. [2] 12 Wheaton, 213.
[3] *Per* Washington, J., 12 Wheaton, 259–262.

the contract itself: and that if such law provides for a discharge of the contract upon prescribed conditions, its enforcement upon those conditions does not impair the obligation of the contract, of which that law itself was a part. In other words, while affirming the decision in *Sturges v. Crowninshield* that a retrospective insolvent law was void, they upheld an insolvent law operating upon contracts made after its passage. Marshall, on the other hand, Duval and Story concurring, maintained in an elaborate and powerful opinion [1] that, however an existing law may act upon contracts when they come to be enforced, it does not enter into them as part of the original agreement; and that an insolvent law which released the debtor upon conditions not, in fact, agreed to by the parties themselves, whether operating on past or future contracts, impaired their obligation. This argument he characteristically enforced by pointing [2] out that upon the opposite view the legislature need only pass a general law declaring all contracts subject to legislative control, and to be discharged as the legislature might prescribe, to enable the State thenceforward to completely nullify and evade the clause of the Constitution under consideration.

But it was also held by a divided court, Marshall concurring [3] that the State law, if a part of the contract, was such only as between citizens of that State; and since the creditor in this case was a citizen of Louisiana, he was not bound by the New York insolvent law, and it did not discharge the debt.

The doctrines announced in *Ogden v. Saunders* have ever since been recognized as established law.[4] But eminent lawyers have considered that the weight of the argument, on the point first mentioned, was with Marshall.

This noble series of decisions may well inspire in every

[1] 12 Wheaton, 332–357. [2] 12 Wheaton, 339. [3] 12 Wheaton, 358, 369.

[4] In *Boyle v. Zacharie*, at the January term, 1832, the Chief-Justice announced that the principles established by *Ogden v. Saunders* must be considered the settled law of the court. 6 Peters, 348.

American a just, a patriotic pride; for it is by means of the principles which, with unsurpassed power of argument, they established, that the Constitution stands today, in the words of Mr. Justice Miller,[1] "a great bulwark against popular effort, through State legislation, to evade the payment of just debts, the performance of obligatory contracts, and the general repudiation of the rights of creditors."

I can allude to but one other decision by Marshall, construing an express restriction upon the States. This was the case of *Craig v. Missouri*, decided in 1830;[2] in which certain loan certificates, issued by the State of Missouri, and intended for general circulation, were held "bills of credit" emitted by a State, contrary to the prohibition of the Constitution; and that a note given in consideration thereof was therefore void.[3]

In perfect consistency, though in apparent contrast, with these decisions, he held in *Barron v. The Mayor, etc., of Baltimore*,[4] in 1833, that the provision in the Fifth Amendment to the Constitution, that private property shall not be taken for public use without just compensation, was a restriction upon the power of Congress alone, and not upon the States. This he demonstrated in a simple but conclusive argument, which asserts the independence of each State, within its own sphere, as strongly as he had before maintained the supremacy of Congress in national affairs.

[1] Address on the Supreme Court, June, 1887.

[2] 4 Peters, 410.

[3] This decision was affirmed by Marshall, in 1834, in *Byrne v. Missouri*, 8 Peters, 40. In *Briscoe v. Bank of the Commonwealth of Kentucky*, 11 Peters, 257, decided in 1837, after Marshall's death (Chief-Justice Taney having succeeded him), a majority of the court held that the charter of the bank was constitutional, and the notes issued by it valid, although the State was the only stockholder; and that this was consistent with the decision in *Craig v. Missouri*. From this, Mr. Justice Story strongly dissented (11 Peters, 328); stating that on a former argument of the same case, a majority of the court, among whom was Chief-Justice Marshall, were of opinion that the Act was unconstitutional and void, within the decision in *Craig v. Missouri*.

[4] 7 Peters, 243.

The trial of Aaron Burr, for treason, in the United States Circuit Court at Richmond, Virginia, in 1807, was a political event of the highest interest, and its conduct by Marshall strikingly illustrates his personal and intellectual traits; but its dramatic incidents are beyond the purpose of this paper.[1]

Burr was indicted for treason, but the only overt act charged was that of levying war against the United States on Blennerhassett's Island, in the District of Virginia. The Constitution itself[2] forbids conviction for treason unless on the testimony of two witnesses to the same overt act. The prosecution admitted that Burr was not in the District of Virginia when the overt act was committed, but offered proof to connect him with those who committed it; which Burr's counsel moved to exclude as irrelevant. In an elaborate and acutely reasoned opinion, Marshall sustained the motion; holding that Burr, being neither actually nor legally present, could not be convicted of the overt act charged in the indictment; and that if, being at some place without the district of Virginia, he procured the commitment of that act by others, and even if such procurement was an overt act of treason under the Constitution, yet that was not the overt act for which he was indicted. This ended the case; and Wirt, who made one of his most celebrated speeches during that trial, wrote to a friend[3]: "Marshall has stepped in between Burr and death." This ruling was severely censured by some who held it inconsistent with certain *dicta* in the case of Bollman and Swartwout, decided not long before by Marshall in the Supreme Court; but this the opinion itself disproves.[4] How deep-

[1] Besides the complete report of "Burr's Trial," published by David Robertson, in 1808, an interesting account is given of it in Kennedy's Life of Wirt, Vol. I., pp. 161–206; also a brief summary in Van Santvoord's Lives of the Chief-Justices, pp. 364–79. Marshall's opinion is printed in the appendix to 4 Cranch, Note B, p. 473.

[2] Article III., Section 3.

[3] To Dabney Carr; see Kennedy's Life of Wirt, Vol. I., p. 221.

[4] 4 Cranch, pp. 525–7.

ly Marshall felt, with what undaunted courage he met, the responsibility of that decision, its closing paragraphs plainly reveal:

"Much has been said in the course of the argument on points on which the court feels no inclination to comment particularly, but which may, perhaps, not improperly receive some notice.

"That this court dares not usurp power is most true. That this court dares not shrink from its duty is not less true.

"No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he has no choice in the case; if there is no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace."

It is not surprising that Marshall was bitterly assailed[1] for a decision which permitted a man so dangerous and so detested as Burr to escape. Ten or fifteen years before Washington was charged by angry partisans with plotting to make himself a king. But when the passions and prejudices of men had cooled down, the nation honored all the more the inflexible judge who thus calmly dared without fear or favor to administer the law.

The decisions thus briefly summarized give no adequate conception of Marshall's immense contributions to other departments of jurisprudence. I cannot even allude to his masterly judgments in cases involving questions of international law, treaty rights and obligations, neutral and belligerent rights, prize and admiralty law, titles under the land laws of various States, insurance and other mercantile questions, the law of trusts, of charities, of powers,—for in more than five hundred opinions he dealt with almost every head of modern jurisprudence. But

[1] See Van Santvoord's Lives of the Chief-Justices, p. 378.

his fame chiefly rests, as it ought, upon those great opinions by which were expounded the brief and pregnant phrases of the Constitution, revealing alike its purpose and its power.

"Other judges," said Story, in dedicating to Marshall his Commentaries on the Constitution,—

"Other judges have attained an elevated reputation by similar labors in a single department of jurisprudence. But in one department (it need scarcely be said that I allude to that of constitutional law) the common consent of your countrymen has admitted you to stand without a rival. Posterity will surely confirm by its deliberate award what the present age has approved as an act of undisputed justice."

In this his opportunity was not less exceptional than his great powers and his unprecedented task. That he felt it to be so is shown by the nature and methods, as well as the magnitude of the work he did. Never dealing in abstract theories, never going beyond the case in hand, nor failing clearly to discern and steadfastly to insist upon the strict limits of the judicial power, he never neglected an opportunity for developing and presenting in all its aspects the great and novel political conception embodied in the Constitution,—a political conception at once profoundly simple and singularly complex; one people and many States, the government of each supreme in its own sphere; the strength and safety of each, and the prosperity of all, dependent upon and assured by the absolute supremacy of the fundamental law. A single phrase, in one of his latest decisions, struck the key-note of all,—when he spoke of the exercise of the jurisdiction of the Supreme Court as "indispensable to the preservation of the Union, *and consequently of the independence and liberty of these States.*"[1] Thus, in fulfilling the highest duties of the judge, he exercised the noblest functions of the statesman.

In doing this, he sought neither to enlarge nor to

[1] *Craig v. Missouri*, 438.

restrict the meaning, but to ascertain and enforce the true intent, of the Constitution and the law, to the sole end that its purposes might be fulfilled. As between a so-called strict or liberal construction, he advocated neither. In *U. S. Bank v. Deveaux*,[1] he said:

"The Constitution and the law are to be expounded, without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws."

In *Ogden v. Saunders*[2] he stated thus the true rule of construction:

. . . "that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers."

In *Gibbons v. Ogden*[3] he said:

"The enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. . . . We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred."

In the same case, in reply to the contention of Ogden's counsel[4] for a strict construction of the powers expressly

[1] 5 Cranch, 87. [2] 12 Wheaton, 332. [3] 9 Wheaton, 188, 189.
[4] See Mr. Oakley's argument, 9 Wheaton, 34.

delegated to Congress by the Constitution, the Chief-Justice said :[1]

"What do gentlemen mean by a strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded."

It was in applying these principles to each case as it arose that his great powers were displayed: the extraordinary penetration which seized upon its vital issues, the acuteness which distinguished, and the patience which disentangled, truth from fallacy; the breadth of view which overlooked no remote consequence, and the power of luminous statement which not only justified the conclusions reached in the particular case, but made plain their application to cases yet to arise. And so, as Professor Bryce has felicitously said :[2]

"The Constitution seemed not so much to rise under his hands to its full stature, as to be gradually unveiled by him till it stood revealed in the harmonious perfection of the form which its framers had designed."

But nothing is more impressive or more characteristic in his opinions, to whatever subject they relate, than the serenely impartial spirit in which he expounds the law, seeking truth and justice for their own sake, not merely

[1] 9 Wheaton, 188. [2] The American Commonwealth, Vol. I., p. 375.

unheeding but apparently unconscious of any other end in view. The course of his thought, the sweep of his argument, is like the stately flight of an eagle through the upper air; whose keen and powerful vision takes in every object in the broad landscape, but from a height at which the sounds of bustle and turmoil beneath have died away. Some of the constitutional questions decided by him were also subjects of fierce and prolonged political controversy. The supporters and opponents of a bank charter,[1] like those who advocated and those who denounced the Virginia and Kentucky Resolutions of 1798–9, asserted with equal vehemence their scrupulous fidelity to the Constitution and the sacrilegious disregard of its provisions by the opposite party. Marshall, as we have seen, while in political life, was a Federalist leader. No man's convictions were stronger, or could have been more fearlessly avowed or supported. But his opinions in *McCulloch v. Maryland*, in *Osborn v. Bank of the United States*, in *Cohens v. Virginia*, do not contain a word or a phrase from which it could be discerned that political parties had ever divided upon any question discussed in them,—still less with what party their author had ever been identified.

It has been remarked that Marshall rarely invoked the authority of adjudged cases, especially in his constitutional decisions. He does not cite a single decision in *Marbury v. Madison*,[2] or in *Cohens v. Virginia*, or in either of his great opinions in *Sturges v. Crowninshield*, *McCulloch v. Maryland*, and *Dartmouth College v. Woodward*, all decided[3] at the February Term, 1819, in the last of which Story's very able concurring opinion fairly bristles with them. In deciding such questions Marshall was laying foundations, and erected no scaffolding. Or, as Judge Story himself said:

[1] See Carl Schurz' Life of Henry Clay (American Statesmen Series), Vol. I., pp. 63, 66, 375.

[2] That is, on the constitutional question; and only one, a decision of Lord Mansfield, on the proper functions of the writ of *mandamus*.

[3] 4 Wheaton, 191; 400; 624.

"When I examine a question I go from headland to headland, from case to case; Marshall has a compass, puts out to sea, and goes directly to his result."[1]

But when learned precedents were needed, he was at no loss for them. Many other decisions show his wide research and familiarity with the best learning of the time. At the same February Term, 1819, in *The Trustees of Baptist Association v. Hart's Executors*,[2] a leading case upon the law of trusts and charities, his opinion was fortified by weighty English authorities. Other important decisions, involving the doctrines of equitable liens, of powers, of relief in equity against mistake, of the illegality of contracts, the powers of corporations at common law, and other general topics, show equal learning.[3]

The great influence which Marshall's intellectual power commanded was enhanced by his singularly winning personal traits. It is said that he never had a quarrel or an enemy. Friends and political opponents alike bear witness to the perfect purity of his life, his absolute integrity, his simple and genial manners, the gentle dignity of his bearing, and the sweetness and serenity of his temper. His demeanor on the bench was a model of judicial dignity, courtesy, and patience; and the popularity which was remarkable even in his youth, became in later years an exalted and affectionate veneration, which his associates shared with the bar and the people at large.[4] This was touchingly exhibited in the Virginia Convention which met in 1829 to frame a new State Constitution; of which Marshall, Madison, and Monroe were members. Marshall

[1] See an interesting article on John Marshall in the *American Law Review* (April, 1867), Vol. I., p. 432, by Theophilus Parsons.

[2] 4 Wheaton, 1.

[3] See, among other cases, *Bayley v. Greenleaf*, 7 Wheaton, 46; *Hunt v. Rousmanier*, 8 Wheaton, 174; *Armstrong v. Toler*, 11 Wheaton, 258; *Bank of United States v. Dandridge*, 12 Wheaton, 64.

[4] See Story's Discourse, Miscell., pp. 648, 679–81; Van Santvoord's Lives, etc., pp. 312, 363, 384; Magruder's Life of Marshall (American Statesmen Series), pp. 270–78.

was then in his seventy-fifth year, but a contemporary describes him as having "a face of genius and an eye of fire." His speeches, infrequent and brief, but always clear and powerful, were listened to with the most eager and respectful attention, and any dissent from his opinions was almost invariably accompanied by some expression of veneration for his character and affectionate attachment for his person.[1] Still later, an English traveller of note, who met him in Washington, dwells with enthusiasm upon the simple dignity of "the tall, majestic, bright-eyed old man"; while another describes his countenance as indicating that simplicity of mind and benignity which so eminently distinguished his character, and the venerable dignity of his appearance as comparing favorably with that of the most distinguished-looking peer in the British House of Lords.[2]

Upon his death, in July, 1835, fitting expression was given to the veneration in which the great jurist was held by the bench and bar of the Union. Among such tributes, perhaps none was more impressive than the resolutions unanimously adopted by the bar of Charleston, South Carolina, upon the motion of one its most eminent members,[3] and from which I quote a single felicitous sentence:

'Even the spirit of party respected the unsullied purity of the Judge, and the fame of the Chief Justice has justified the wisdom of the Constitution, and reconciled the jealousy of freedom to the independence of the judiciary."

Marshall was still Chief-Justice in 1831, when De Tocqueville, after a profound study of American institutions, wrote thus of the Supreme Court:

"When we have successively examined in detail the organi-

[1] Flanders' Lives, etc., Vol. II., pp. 501, 513.

[2] Miss Martineau's Western Travel, Vol. I., p. 247; and Travels in North America, by the Hon. Charles Augustus Murray, Vol. I., p. 158.

[3] James L. Petigru, Esq. These proceedings were entered in full upon the minutes of the Supreme Court at the January Term, 1836, and are given in 10 Peters, page ix.

zation of the Supreme Court, and the entire prerogatives which it exercises, we shall readily admit that a more imposing judicial power was never constituted by any people. The Supreme Court is placed at the head of all known tribunals, both by the nature of its rights and the class of justiciable parties which it controls." [1]

Another half century has passed, memorable for the unparalleled growth of the nation, in numbers, in wealth, in territorial extent; still more memorable for the deadly perils which threatened its life, but which, at a fearful cost, were overcome. That august tribunal still maintains, from ocean to ocean, among a reunited people, its peaceful and unquestioned sway under a constitution purified as by fire. Yet still, in the recent words of one of its most eminent members [2]:

"It is, so far as the ordinary forms of power are concerned, by far the feeblest branch or department of the government. It must rely upon the confidence and respect of the public for its just weight and influence, and it may be confidently asserted that neither with the people, nor with the country at large, nor with the other branches of the government, has there ever been found wanting that respect and confidence."

How that court has fulfilled its great trust this universal respect and confidence affords the highest proof. But such a sentiment could not be affirmed of any people which was not also, by instinct and by habit both, imbued with a legal spirit, and trained to reverence the law. And pre-eminent among the influences which cultivated that spirit, and to which that training is due, must be reckoned the lucid and irresistible reasoning, the profound political insight, the splendid courage tempered by judicial caution, the exalted patriotism and the majestic character of John Marshall, the Expounder of the Constitution.

[1] Democracy in America (Reeve's translation), Vol. I., p. 148.

[2] Address of Mr. Justice Miller on "The Supreme Court of the United States," at the Semi-Centennial Celebration of the University of Michigan, June 29, 1887.

U. S. SUPREME COURT: CONSTITUTIONAL DECISIONS,

1790 to 1835.

	DATE.	CAUSE.	CURTIS.	REPORTS.
		CONSTITUTIONAL DECISIONS, 1790–1801.		
	1793	Chisholm *v.* Georgia	1 C. 16	2 D. 14
	1796	Hylton *v.* U. S	1 " 150	3 " 171
	1798	Hollingsworth *v.* Virginia	1 " 266	3 " 378
	1798	Calder *v.* Bull	1 " 269	3 " 386
	1799	Fowler *v.* Lindsey	1 " 291	3 " 411
	1800	Cooper *v.* Telfair	1 " 314	4 " 14
		1801–1835. DECISIONS BY MARSHALL.		
	1801	Wilson *v.* Mason	1 C. 346	1 Cr. 45
b	1803	Marbury *v.* Madison	1 " 368	1 " 137
c	1804	*Little v. Barreme*	1 " 465	2 " 170
b	1804	U. S. *v.* Fisher	1 " 496	2 " 358
a b	1805	Hepburn *v.* Ellzey	1 " 520	2 " 445
c	1806	*Wise v. Withers*	1 " 597	3 " 331
a b	1807	*Ex parte* Bollman & Swartwout	2 " 23	4 " 75
b	1807	U. S. *v.* Burr (Va. Circuit Court)	(4 Cr. App. 469.)	
	1808	Rose *v.* Himely	2 C. 87	4 Cr. 241
a b	1809	Bank of U. S. *v.* Deveaux	2 " 194	5 " 61
b	1809	U. S. *v.* Peters	2 " 206	5 " 115
b	1810	Fletcher *v.* Peck	2 " 328	6 " 87
a	1810	Durrousseau *v.* U. S	2 " 412	6 " 307
	1812	New Jersey *v.* Wilson	2 " 498	7 " 164
	1815	Clark's Ex'r *v.* Van Riemsdyk	3 " 304	9 " 153
b	1818	U. S. *v.* Bevans	4 " 231	3 Wh. 336
c	1818	*Evans v. Eaton*	4 " 260	3 " 454
b	1819	Sturges *v.* Crowninshield	4 " 362	4 " 122
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b	1819	Dartmouth College *v.* Woodward	4 " 463	4 " 518
b	1820	Loughborough *v.* Blake	4 " 643	5 " 317
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b	1820	Brig *Wilson v.* U. S. (Va. Circuit)	(1 Brock. R. 423.)	
	1821	Farmers' and Mechanics' Bank, Pa., *v.* Smith	5 C. 37	6 Wh. 131
b	1821	Cohens *v.* Virginia	5 " 82	6 " 264
b	1823	U. S. *v.* Maurice (Va. Circuit)	(2 Brock. R. 96.)	
b	1824	Gibbons *v.* Ogden	6 C. 11	9 Wh. 1

	DATE.	CAUSE.	CURTIS.	REPORTS.
b	1824	Osborn *v.* Bank of U. S.....	6 C. 251	9 Wh. 738
b	1824	U. S. Bank *v.* Planter's B'k of Ga.	6 " 304	9 " 904
	1825	Wayman *v.* Southard.....	6 " 311	10 " 1
b	1827	Ogden *v.* Saunders (Marshall diss.)	7 " 196	12 " 332
b	1827	Brown *v.* Maryland.....	7 " 262	12 " 419
a	1828	Governor Ga. *v.* Madrazo.....	7 " 481	1 Pet. 110
b	1828	Am. Ins. Co. *v.* Canter..... ...	7 " 685	1 " 511
	1829	Wilson *v.* Blackbird Cr. M. Co....	8 " 105	2 " 245
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a b	1831	Cherokee Nation *v.* Georgia.....	9 " 178	5 " 1
a b	1832	Worcester *v.* Georgia.....	10 " 214	6 " 515
b	1833	Barron *v.* Baltimore.....	10 " 464	7 " 243
a	1834	Byrne *v.* Missouri.....	11 " 18	8 " 40
		DECISIONS BY STORY.		
	1815	Terrett *v.* Taylor.....	3 C. 249	9 Cr. 43
	1815	Town of Pawlet *v.* Clark.....	3 " 358	9 " 292
b	1816	Martin *v.* Hunter's Lessee.....	3 " 562	1 Wh. 304
a b	1820	U. S. *v.* Smith.....	4 " 597	5 " 153
b	1827	Martin *v.* Mott.....	7 " 10	12 " 19
	1829	Wilkinson *v.* Leland.....	8 " 238	2 Pet. 627
	1830	Soc. Prop. Gosp. *v.* Pawlet.....	9 " 160	4 " 480
	1832	Boyle *v.* Zacharie.....	10 " 291	6 " 635
	1834	Watson *v.* Mercer.....	11 " 38	8 " 88
	1834	Mumma *v.* Potomac Co.....	11 " 102	8 " 281
	1835	Beers *v.* Haughton.....	11 " 376	9 " 329
		DECISIONS BY WASHINGTON.		
a b	1820	Houston *v.* Moore..... ..	4 C. 535	5 Wh. 1
	1823	Soc. Prop. Gosp. *v.* New Haven..	5 " 483	8 " 464
	1826	U. S. *v.* Kelly.....	6 " 645	11 " 417
b	1827	Ogden *v.* Saunders (M. diss.).....	7 " 132	12 " 213
b	1829	Satterlee *v.* Matthewson.....	8 " 147	2 Pet. 380

	DATE.	CAUSE.	CURTIS.	REPORTS.
		DECISIONS BY JOHNSON.		
a	1812	United States *v.* Hudson.....	2 C. 445	7 Cr. 32
	1813	Brig Aurora *v.* United States.....	2 " 583	7 " 382
a b	1819	Bank of Columbia *v.* Okeley.....	4 " 387	4 Wh. 235
b	1821	Anderson *v.* Dunn.....	5 " 61	6 " 204
	1827	Shaw *v.* Robbins.....	7 " 226	12 " 369
	1833	Livingston's Lessee *v.* Moore.....	10 " 546	7 Pet. 469
		DECISIONS BY PATERSON.		
	1803	Stuart *v.* Laird.....	1 C. 414	1 Cr. 299
		DECISIONS BY CUSHING.		
	1808	M'Ilvaine *v.* Coxe's Lessee.....	2 C. 74	4 Cr. 209
		DECISIONS BY BALDWIN.		
	1830	Jackson *v.* Lamphire.....	8 C. 419	3 Pet. 280
		DECISIONS BY THOMPSON.		
a b	1827	Mason *v.* Haile.....	7 C. 227	12 Wh. 370

SUMMARY.

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" " " " *on Circuit*, 3.

" " " Story 11

" " " Johnson 6

" " " Washington 5

" " " Paterson, Cushing, Baldwin, Thompson, one each . . 4—61

The above cases are all indexed in Curtis' Digest of United States Supreme-Court Decisions, under the head of "Constitutional Law," *except* those above indicated by "*a*," which are placed under other heads ; and except, also, decisions on the Circuit.

The cases above indicated by "*b*" are found in the collection of Marshall's opinions, published in 1839 (Jas. Monroe & Co., Boston), under the title of "Marshall on the Constitution."

The cases above indicated by "*c*", though indexed by Curtis under "Constitutional Law," do not seem to involve any constitutional questions, and are not counted as such in the above summary.

LECTURE III.

CONSTITUTIONAL DEVELOPMENT IN THE UNITED STATES AS INFLUENCED BY CHIEF-JUSTICE TANEY.

By GEORGE W. BIDDLE, of Philadelphia.

CONSTITUTIONAL DEVELOPMENT IN THE UNITED STATES AS INFLUENCED BY CHIEF-JUSTICE TANEY.

FOR nearly two thirds of the present century the Federal Supreme Court has been presided over by two judges who, differing in many sides of their judicial character, had, nevertheless, strong points of resemblance in their high moral attributes, firmness of intellectual grasp, simplicity and directness of purpose, and equanimity and calmness of temperament. They have both left the impress of their great powers upon the government of their country through the judgments rendered by them in the court of which they were the successive heads. Perhaps, to a large degree, the formation and tendency of their judicial opinions were the outcome of the condition in which their country was found at the different periods in which they were respectively called upon to shape and give direction to the forces—passive rather than active—with which they were obliged to deal. Nor is it any disparagement of them to speak in this way, since all men are largely controlled by the environments within which they are placed and expected to act. Separated in years by scarcely a generation, both the children of the period which witnessed the introduction of the United States into the family of nations, there were very marked and distinctive changes in the condition of the country at the times they were successively engaged in the discharge of the duties of their high office. MARSHALL, himself an actor in the conflict which [illegible]ed in the achievement of American independence, saw the weakness of the original government, and wit-

nessed the throes and pangs in which the present Constitution was ushered into being. Coming to the Supreme Court in its infancy, himself hardly past middle age—he was but forty-six,—he had seen the dangers and difficulties—almost the disasters—which the feeble government that had just passed away had been compelled to encounter, and had marked the gloomy passages which accompanied the issuing into life of the new government. It was in its infancy, and needed strength and encouragement. It was untried and required support and assistance. TANEY, on the other hand, although cradled in the midst of revolutionary strife, was a child at the time of the adoption of the Constitution, and scarcely old enough to remember the gloom which hung over the country from the time the war of independence closed, until the period when the Constitution was doing its work with comparative smoothness and efficiency. When he was called to the Supreme Court, the country had passed a second time through a war with Great Britain with honor and success, and was immerging into that broad day of wonderful physical advance, the like of which the world has never seen. Its mighty rivers and great lakes were being daily traversed by leviathans propelled by steam, railroads were being laid out in all directions over the surface of the land, and time and space seemed no longer able to confine the energies and destinies of the teeming millions of its inhabitants. The strength of the General Government had been demonstrated, the ability of the States to deal with all questions of internal polity was confirmed. If the country was to proceed in its career of prosperity and progress, it was to be by strict adherence to the provisions of the compact by which not only the original thirteen States were bound together, but under which the occupants of the whole continent would, sooner or later, be united in the closest ties of amity and brotherhood. In our examination of the wo performed by Chief-Justice TANEY in the exposition

the charter of our rights, we must, therefore, keep in view the period at which he was called to the discharge of his judicial duties, and during which he was continuing to act as the head of the judicial department of the country, and we must give due effect to the marvellous changes that during this entire period were taking place, not only in the United States, but over the whole world. From 1837 to 1864 he sat as the presiding genius of the Supreme Court of the United States, earnest, active, watching with untiring industry over its deliberations, dealing promptly and successfully with the vast and varied mass of litigation which came before him and his associates, and disposing of it with a learning and ability that gave entire satisfaction to the body of suitors and to the people at large, and extorted the admiration of many of his old political opponents. The judgments delivered by him as the organ of this tribunal, as well as the occasional dissents pronounced by him have, with rare exceptions, been finally received as correct expositions or the law of the land. The exceptions, rare as they were, will be hereafter adverted to; but in several instances where, at the time, he was doubted, and even animadverted upon, subsequent examination and reflection have shown the accuracy of his reasoning and the wisdom of his conclusions. Of course, the business of the court had vastly increased, and continued to increase, during the whole time of his incumbency in office. During the thirty-four years in which Chief-Justice MARSHALL sat as the head of the court he delivered over four hundred opinions. Chief-Justice TANEY, sitting several years less, pronounced fewer judgments; but his colleagues were, at the same time, delivering opinions in many cases. His opinions, contained in thirty-two volumes of Reports, beginning with 11 Peters, and ending with 2 Black, are distinguished by their clearness, learning, directness, and [illegible] grasp of the points discussed, and when dealing with [illegible] constitutional subjects, for sound and weighty reasoning,

thorough acquaintance with the political history of the country, and for the close bearing of all contained in them upon the question under examination. This will be apparent as we consider such of them as it is possible to notice somewhat at length in the examination about to be made.

The first case which shall be noticed, almost the first case in which he gave an opinion, is a case found in the early pages of 11 Peters,[1] in which the construction of the Act of Congress of 20th April, 1818, relating to the bringing into the United States, or holding or selling persons as slaves (Rev. Stat. U. States, section 5377) came up for consideration. The CHIEF-JUSTICE delivered the opinion of the court, holding that the act in question being intended to put an end to the slave trade and to prevent the introduction of slaves into the United States from other countries, had no application to a case where the owner of slaves had taken them out of this country and brought them back into it. The case is noticed, not from its intrinsic importance, or for any elaboration in the argument of the principles supposed to be involved in it; but from its being a case in which an aspect of this peculiar domestic relation was presented, and from the fact that the decision was apparently unanimous, four of the seven judges who then composed the court being citizens of non-slaveholding States (Story, McLean, Thompson, and Baldwin).

Postmaster General vs. *Trigg*,[2] in the same volume, decides what might have been supposed to be sufficiently obvious, that a *mandamus* would not be directed to a judicial officer of the United States to show cause why execution should not issue upon a judgment, where the record did not show *mistake, misconduct, or omission of duty* upon the part of the court. The case is eminent merely as an introduction to an important series of

[1] *United States* vs. *Ship* "*Garonne*," 11 Peters, 73 (1837).

[2] 11 Peters, 173.

sions, in which the power of this court to deal with the subject, either originally, or in the exercise of its appellate jurisdiction, was elaborately discussed.

But the crowning case of importance in this volume of Reports is now about to be noticed, namely, that of *Charles River Bridge* vs. *Warren Bridge*,[1] in which there were dissents from the opinion of the court. An outline of the facts of this important cause is now given.

In 1650 the legislature of the Province of Massachusetts granted to Harvard College liberty and power to dispose of the ferry from Charlestown to Boston over Charles River. The college held the ferry, receiving its profits until 1785, when a company was incorporated by the legislature of the State to build a bridge at the place where the ferry was, and to receive the tolls paid for traffic over it; the company paying to the college stipulated sums of money which were ultimately to cease, and the bridge to become the property of the State. The bridge was built, the tolls for traffic over it received, and all things enjoined upon the company were performed, when, in the year 1828, at which time the right to receive tolls and the payment to the college had still a considerable period to run—over twenty-seven years,—the legislature incorporated another company, the defendant in error, to erect another bridge over the same river from Charlestown to Boston, beginning and ending near the *termini* of the original bridge, with power to take tolls, and ultimately to become free, the bridge having in point of fact actually become free at the time the decision in the house was pronounced. The proprietors of the Charles River Bridge Company, asserting that the erection of the Warren Bridge under its act of incorporation was done under a law passed by a State impairing the obligation of contracts, contrary to section 10 of Article I. of the Federal Constitution, sought relief against it in the State courts of Massachusetts, which was refused,[2] and brought

[1] 1 Peters, 420.

[2] See the case reported in 7 Pickering, 344.

the case to the Supreme Court of the United States under the the twenty-fifth section of the Judiciary Act.

The case was argued by the highest legal talent in the country: Messrs. Dutton and Webster appearing for the plaintiff in error, and Messrs. Greenleaf and Davis for the defendant in error.

Chief-Justice TANEY, in delivering the opinion of the court,[1] stated in its outset that the gravity of the questions involved required, and had received, the most anxious and deliberate consideration, and that the court, sensible of its duty to deal with the utmost caution with the interests involved, had guarded, so far as it had the power, the rights of property, and carefully abstained from encroaching upon the rights reserved under the Constitution to the States. After stating the facts, he began by showing that the plaintiffs in error could not support themselves under the principle that the law complained of divested vested rights, for the Constitution of the United States was not violated by so doing. In this connection the cases of *Satterlee* vs. *Matthewson*[2] and *Watson* vs. *Mercer*[3] (both Pennsylvania cases) were referred to; and it was then judicially asserted that the exclusive jurisdiction of the court was to ascertain and decide whether the obligation of a contract had been impaired by the law in question.

The ferry rights referred to had ceased to exist since the erection of the bridge, but these rights were never transferred by Harvard College to the Charles River Bridge Company. They appear to have been extinguished because public convenience was thereby promoted, and compensation was made to the college, by which it had acquiesced, for the extinction of their franchise. Of course, the Charles River Bridge Company obtained no equitable assignment of such rights by the payment of the annuity to the college. Nor could the extent of this pre-existing ferry right have any influe

[1] 11 Peters, 536–553. [2] 2 Peters, 380. [3] 8 Peters, 8

upon the construction of the written charter for the bridge. The two rights could not be associated, since the charter of the company was the instrument which was to be interpreted by its own terms. In the two acts, of 1785 and 1792, we must look for the nature and extent of the franchise conferred upon the plaintiffs.

All ambiguity in the terms of the contract under which the plaintiffs claimed must operate against them, as they could claim nothing which was not clearly given to them; for which proposition a number of Federal decisions were cited. A State was not to be presumed to have surrendered a power analogous to the taxing power, namely, the right to open new channels of communication essential to the comfort, convenience, and prosperity of its people, which should be preserved undiminished. The community itself had rights which must be protected, and its government could not be disarmed, by implications and presumptions, of the powers necessary to accomplish the ends for which it had been created. An analysis of the charter of the elder company was then given, and a comparison of its terms made with those of the charter of the Warren Bridge Company, from which it was shown that nothing was taken from the former by the latter. Its income, it was true, was interfered with, perhaps destroyed; but there was no stipulation against this in the original charter. Nor could such an agreement be implied.

The case was, however, even stronger against the plaintiffs, for by the supplementary act of 1792 its privileges had been extended for thirty years longer. This last act passed only seven years after the original charter providing for the incorporation of another bridge company, the erection of which, it was supposed, might diminish the emoluments of the older bridge, and the extension of privileges of the Charles River Bridge Company was given as a reward for the hazard incurred, not for taking away a right already given. It would indeed be a strong

exertion of judicial power, acting upon its own views of what justice required, to raise by a sort of judicial coercion, an implied contract between the State and the company from the nature of the very instrument in which the legislature appears to have taken pains to use words which disavow any intention on the part of the State to make such a contract.

After alluding to the practice of other States, and stating the results of the doctrine of implied contracts, and the arbitrariness of the rule attempted to be set up, the opinion closed with an affirmance of the judgment of the Supreme Court of Massachusetts.

Justice McLEAN,[1] concurring in the affirmance of the judgment, dilated in his opinion upon the immorality of destroying the value of the elder franchise by indirect means; but it is respectfully submitted that such a line of remark, while justifying an appeal to the sense of right and to the integrity of the State government, is inapplicable to the action of a court of justice, or to the train of reasoning by which judicial action should be controlled. The learned judge, then conceding that the taking of private property for public use, with or without making compensation cannot be said to be impairing the obligation of a contract, believing that the court had no jurisdiction of the cause, although he was "clear that the merits were on the side of the complainants," was in favor of dismissing their bill for want of jurisdiction.

Justice STORY, in an elaborate dissent (in which Justice THOMPSON entirely concurred),[1] after referring to the fact that the case had been twice argued, and at considerable intervals, by reason of a difference of opinion among the judges, began by saying that with all the lights which the researches of the years intervening between the first and last argument had enabled him to obtain, the opinion which he originally formed after the first argument was

[1] His opinion is to be found in pages 554–583 of the Report.

[1] This dissenting opinion is contained in pages 583–650 of the Report.

that which now had his firm and unhesitating conviction. He then proceeded, with much fulness of illustration, and with a display of great and varied learning, to show why it was that the granting of the charter of the Warren Bridge Company was an impairment, by the legislature, of the contract made by it with the former bridge company. He controverted with warmth—perhaps with excessive warmth—most of the positions taken in the opinion of the court; sustained himself largely by copious citations from the opinions of Chancellor KENT and other eminent judges; impugned the rules of construction of legislative grants laid down by the CHIEF-JUSTICE in his opinion, concluding what he had to say on that head by quoting a remark made judicially by the late Chief-Justice PARSONS, that "in England prerogative is the cause of *one* against the WHOLE. Here it is the cause of *all* against *one*. In the first case, the feelings and vices, as well as the virtues, are enlisted against it; in the last in favor of it. And, therefore, *here*, it is of more importance that the judicial court should take care that the claim of prerogative should be more strictly watched." While he admitted that much of what he was contending for rested upon implication, and not upon the words of the charter, he asserted that the implication was natural and necessary, and indispensable to the proper effect of the grant. *The franchise could not subsist without it, at least for any valuable or practical purpose.* His argument upon what was *necessary*, and what was merely *inferential* implication, was ingenious and persuasive, although not convincing. He insisted, moreover, that the Legislature of Massachusetts was, in no just sense, the sovereign of the State. He also attempted to answer the argument that by the grant of a particular franchise, the State does not surrender its power to grant similar franchises; and contended that it could do no act to destroy or essentially impair the franchise granted to the Charles River Bridge Company; the State impliedly

contracting, neither to resume its grant nor to do any act to the prejudice or destruction of its grant. Finally, referring to Judge Washington's opinion in the Dartmouth College case, he quoted from it a passage to the effect that after the grant of a charter by the king it amounted to the extinguishment of his prerogative to bestow the same identical franchise on another corporate body.

It must not be supposed that this meagre outline of Judge STORY'S dissenting opinion in this celebrated case, does justice to the ability by which it is marked throughout. It is a wonderful combination of great learning, and, if the phrase may be permitted, of judicial oratory in defense of a cause in which he thought the principles of morality and public integrity were involved and about to be successfully overthrown in the person of a valuable corporation which had been a pioneer in the cause of internal improvements. It was lighted up with the fires not yet cooled of the rulings in the Dartmouth College case, and was something like a protest against an assault supposed to be about to be committed upon the doctrine solemnly announced by that important decision. It undoubtedly received a portion of its coloring from this belief, and, as a consequence, it did not always keep strictly in view the lines of demarcation between the State and the Federal Constitutions, and the difference of the judicial reasoning which was applicable to each. For instance, there might well have been a divesting of vested rights by reason of the charter granted to the Warren Bridge Company, and yet the Federal Supreme Court was powerless, as Judge McLEAN regrettingly admitted, to deal with it.

In truth the principle of the Dartmouth College case, perhaps correct enough when limited as it was applied to a private grant, had been pushed by its advocates to an extreme that would have left our State governments in possession of little more than the shell of legislative power. If the liberality of construction contended for

had been permitted, all its essential attributes would have been parcelled out, without the possibility of reclamation, through recklessness, or something worse, among the greedy applicants for monopolistic privileges. It was necessary therefore to restrain the effects of this decision within proper limitations, and to demand, when a claim of exclusive right was preferred, that it should be shown either by express terms, or by necessary implication from the words employed. Any other rule of construction would have been inadmissible; and the cause of efficient State government, and of equal justice to all, gained largely by the vigorous treatment which the claim of the elder company received in this case in the opinion of the court. Unless the luxuriant growth, the result of the decision in 4 Wheaton, had been lopped and cut away by the somewhat trenchant reasoning of the CHIEF-JUSTICE, the whole field of legislation would have been choked and rendered useless in time to come, for the production of any laws that would have met the needs of the increasing and highly developed energies of a steadily advancing community. The country owes a debt of gratitude to Judge TANEY and his coadjutors for the manner in which this question was dealt with in the outset of his judicial career; and the profession, which, I think I may say, has regarded with entire approval the restrictions imposed upon the claims of exclusive right set up under color of legislative grant, must continue to admire the quiet strength of the reasoning upon which the conclusions reached in the opinion of the majority of the court repose. It is to be hoped that the space given to a discussion of this case has not been unduly large, as the principles involved in it seem to lie at the foundation of representative government in the United States.

In the volume of 12, Peters' Reports, several interesting points of practice were cited, and one or two cases of considerable political importance came before the court.

Thus, in *Garcia* vs. *Lee*,[1] the principle by which it was declared that the boundary line determined as the true one by the political departments of the government must be recognized as the true one by the judicial departments was again affirmed, the CHIEF-JUSTICE declaring the opinion of the court. But the case immediately following this case[2] aroused the public attention in a high degree, and was marked by the dissent of the CHIEF-JUSTICE, and Justices BARBOUR and CATRON. As it involved an important political question, as well as a legal and constitutional one, it deserves to be considered. The following outline of the facts will show how the case arose:

The Postmaster-General had been directed by an Act of Congress to credit certain mail contractors, S. & S., with the amount of a sum of money awarded by the Solicitor of the Treasury as due to them under certain contracts with the government. The Solicitor having made his award, the Postmaster-General declined to allow it in full, on the ground that the Solicitor had exceeded his authority. The mail contractors, thus refused the full credit awarded them, applied to the Circuit Court of the District of Columbia for a *mandamus* to compel the Postmaster to pay them the full amount of the award. This official having declined to obey the writ *nisi*, upon grounds set forth in his answer thereto, the Circuit Court ordered a peremptory writ of *mandamus* to be issued, and the Postmaster prosecuted a writ of error to this judgment of the Circuit Court. This judgment was affirmed, Justice THOMPSON delivering the opinion of the court, in which two inquiries were made and answered affirmatively: 1. Did the record present a proper case for the issuing of the writ? 2. If it did, had the Circuit Court of the District authority to issue the writ?

The court, in answering the first inquiry, ruled that the act directed to be performed by the Postmaster-General was simply ministerial, as it would be absurd to suppose

[1] 12 Peters, 511. [2] *Kendall* vs. *U. States*, 12 Peters, 524.

that Congress could not impose upon any executive officer any duty which it thought proper. The remedy by *mandamus* was, therefore, proper and appropriate. To the second question the learned judge, in a labored effort to show that, either by the adoption of the laws of Maryland in the District, or under the terms of the Act of Congress of 13th February, 1801, giving jurisdiction to the Circuit Courts of the United States, which had been repealed, and by the Act of 27th February, 1801, concerning the District of Columbia, answered that the Circuit Court of the District had authority to issue the writ.

The CHIEF-JUSTICE, in his dissenting opinion, conceded that, as the office of Postmaster-General is not created by the Constitution, this officer is subject to any supervision or control which the wisdom of Congress might deem right. That it was, therefore, his duty to credit the relators in the manner provided, and that, upon his failure to do so, a proper case for the issuance of the writ of *mandamus* was presented. But he denied the authority of the Circuit Court of the District to issue this writ. His reasoning was as follows:

1. The Circuit Courts of the United States for the States had, admittedly, no power to issue this writ.

2. No reason of policy or public convenience could be assigned for giving to the Circuit Court of the District a power denied to the Circuit Courts of the States.

3. It follows that those who maintain that the Circuit Court of the District possessed the power, must show distinctly the language under which it was conferred, and they failed to do this.

A. For the first section of the Act of 27th February, 1801, which enacted that the laws of Maryland, as they then existed, should be in force in that part of the District, etc., did not do it for two reasons: (*a*) In Maryland, at that time, this writ issued only from its *highest court*, the *General Court*. Therefore the adoption of the law of this State could not give the Circuit Court for the Dis-

trict the power to issue this writ as an incident to its general jurisdiction over cases at common law. (*b*) Besides, the notion of a State court having the power to issue this writ to a Federal officer was untenable.

B. If it be said that the authority may be found in the third section of this Act of 27th of February, 1801, giving all the powers then vested in the Circuit Courts, which at that time possessed the right to issue this writ under the Act of 13th February, 1801, since repealed, two answers are given to this contention:

1. As the Act of the 27th February did not refer by words to the powers given by the Act of the 13th February, its obvious meaning was that the powers of the Circuit Court of the District should be measured by the existing powers of the Circuit Courts as generally established; what was intended was uniformity of jurisdiction.

2. Even if the powers of the Circuit Court of the District are to be regulated by the repealed Act of 13th February, 1801, the result will not be different. The third section of the Act of 27th February, 1801, gives the Circuit Court of the District "all the *powers* vested by law in the Circuit Courts"; while the fifth section enumerates the matters of which it shall *have cognizance*. *Powers* and *cognizance* have here a different meaning, the word *powers* being employed to denote the process, the modes of proceeding, which the courts are authorized to use in the exercise of their jurisdiction in the cases committed to their *cognizance*. But these powers are given by reference to preceding laws, so that we are carried back to the Act of 1789 to learn what they were. And on turning to this Act, we find the power given to the Supreme Court to issue the writ of *mandamus* "to persons holding office under the authority of the United States," but no such power is given to the Circuit Courts.

Moreover, as the fifth section of the Act of 27th February, 1801, specified the cases of which the Circuit Court of this District should have *cognizance*, if there be

found any substantial difference in the jurisdictions defined in the two laws under consideration, the just inference is that the legislature intended them to be different, and that the Circuit Court of the District was not intended to have the same jurisdiction given to the others.

This inference would be legitimate in comparing laws establishing different courts, and becomes almost irresistible when we reflect that the laws were passed within a few days of each other, and probably were under consideration at the same time.

Nor are there any reasons of policy which should induce the court to infer an intention to confer this authority when the words of the law do not require it. Officers of the General Government are found, in all the States, required by law to do acts which are merely ministerial, and in which the private rights of individuals are concerned. And there would be at least as much reason for conferring the power to issue this writ on the Circuit Courts of the several States as on the Circuit Court of the District of Columbia.

This dissenting opinion exhibits in a high degree the ability of the CHIEF-JUSTICE to present an argument upon a technical point, with the nicest precision of reasoning, the closest application of the rules for the exposition of statutes, and the fullest and fairest examination of the grounds upon which the opposing argument is based. It is difficult to escape from the conclusion arrived at, that the Circuit Court of the District had no authority to issue the writ of *mandamus;* but when we come to examine a point referred to by Justice CATRON[1] in his dissenting opinion, the argument against this authority almost possesses the value of certainty. The reference is as follows: The case of *Marbury* vs. *Madison*[2] was brought before the Supreme Court in 1803, at a time when the warmth of party feeling was so great as to induce an

[1] See his dissenting opinion in the Appendix to 13 Peters, 607.

[2] 1 Cranch, 49.

application for the issuance of this writ against Mr. Madison, at that time Secretary of State. And yet Chief-Justice MARSHALL having ruled, that although the case was a proper one for the issue of the writ, and spoke of the act of withholding the commission of the justice who applied for the writ as violative of a vested legal right, he decided against the power of the Supreme Court to issue the writ. But he said, in speaking of the necessity of a remedy: "The Government of the United States has been emphatically termed a government of laws and not of men; it will certainly cease to deserve this appellation if the laws furnish no remedy for the violation of a vested legal right."[1] And yet no department of the government—to use Judge CATRON'S words—judicial tribunal, or law officer of the United States apprehended at that time, or for more than thirty years afterwards, that an appropriate remedy then existed in the Circuit Court of the District of Columbia, although the legislation of 1801 was recent and fresh in every one's memory.

A suit between two sovereign States upon a question of boundary came up at the same term,[2] in which a majority of the court held, that as this was a civil controversy between the parties in regard to the locality of a topographical point, and as questions of boundary had been frequently made the subject of bills in equity, the case was plainly comprehended by the language of the Constitution giving power to the Federal courts to entertain jurisdiction of controversies between States. The objection that the decree of the court could not be executed without an Act of Congress, was without force, for the reasons given.

The CHIEE-JUSTICE dissented upon the ground that the question was not a judicial one, as Rhode Island claimed no right of property in the soil of the territory in controversy; it was, therefore, a political question. The

[1] *Marbury* vs. *Madison*, 1 Cranch, 59.

[2] *State of Rhode Island* vs. *State of Massachusetts*, 12 Peters, 657.

cause was presented in various shapes, from time to time, and finally decided in favor of the State of Massachusetts.[1]

While in my judgment the objection to the jurisdiction made by the CHIEF-JUSTICE was, perhaps, not well taken, undoubtedly Justice BALDWIN, in delivering the opinion of the court, said many things unnecessary for its support and that might have been questioned, and so thought Justice BARBOUR.[2] Justice STORY did not sit.

And almost immediately afterwards,[3] in another branch of the cause, the court said that it did not put its decision, sustaining its jurisdiction, upon the ground of the State of Massachusetts having appeared in the cause; and that it was not to be understood as being ruled by the court that that State had concluded herself by voluntarily appearing, or that if she had not appeared the court would not have assumed jurisdiction. In fact, the State of Massachusetts was allowed to withdraw her appearance. From this last opinion Justice BALDWIN dissented.

A short but instructive case,[4] turning upon the construction of the Act of Assemby of the State of Maryland of 1791, by which that State ceded to the United States that part of the District of Columbia lying within its territorial limits, may be briefly adverted to. It was held, the CHIEF-JUSTICE giving the opinion, that as the government had accepted the cession made by this State law, the conditions contained in it made part of the contract between the parties; and consequently the laws of Maryland and the jurisdiction of its courts continued in force until Congress took upon itself the government of the District. And as it was uncertain when the United States would assume jurisdiction, it must have been foreseen that whenever that event should happen many suits would be found pending in the State courts, it could not

[1] *Rhode Island* vs. *Massachusetts*, 4 Howard, 591. [2] 12 Peters, 754.
[3] *State of Massachusetts State* ads. *State of Rhode Island*, 12 Peters, 755.
[4] *Van Ness* vs. *Bank United States*, 13 Peters, 17.

have been the intention that such suits should abate, and that suitors who had rightfully instituted proceedings in the State courts should, immediately upon assumption of jurisdiction by the Federal Government, be compelled to abandon the State tribunals and begin anew in the courts of the District.

The following cases[1] are mentioned, because they settle an interesting principle in regard to the tenure of certain offices held under the General Government. It was ruled that it was not the intention of the Constitution that those offices which are denominated inferior should be held for life, and that in the absence of constitutional or statutory provision, the power of removal is incident to the power of appointment; and that as clerks of the District Courts of the United States fell within this category, and were removable by the judges of those courts, the Supreme Court could not entertain any inquiry into the grounds of removal.

We must now notice a question of considerable importance, which both early and late engaged the attention of this court, involving not only the right of corporations to make contracts outside the territorial limits of the country from the laws of which they derived their being, with the consequent power of suing in foreign countries, but their right to sue at all, by reason of citizenship, in the Federal courts. The Constitution, as we know, in the article vesting the judicial power of the United States in the Federal courts, extended it to controversies between citizens of different States.[2] The question arose very early, whether a corporation created under the laws of one State could sue a citizen of another State[3]; and it was held that in such a question the court might look to the character of the persons composing the corporation, and if it appeared that they were citizens of another State,

[1] Ex parte, *in the matter of Hennen*, 13 Peters, 225, 230.

[2] Constitution, Article III., section 2.

[3] *U. States* vs. *Deveaux*, 5 Cranch, 61.

and the fact was set forth by proper averments, the corporation might sue in its corporate name in the courts of the United States. This decision, made at first with hesitating diffidence, was affirmed in the case in 13 Peters, acquired greater strength each time it was presented, and finally, while Chief-Justice TANEY still presided in the court, attained to a robustness of vitality that enabled it to defy all assaults upon it, even when made under averments which might have been founded in fact. In the cases now to be noticed [1] certain principles were asserted in a compact, well-reasoned opinion delivered by Chief-Justice TANEY,[2] which is remarkable in its statement of the law, as well in what it denies as in what it affirms of the arguments of the very eminent counsel—Messieurs Ogden, Sergeant, and Webster—who represented the different plaintiffs in error. Thus, in particular, while it concedes that the citizenship of the corporators will be considered so far as it concerns the question of jurisdiction, it dismisses with unanswerable force of reasoning the pretention that not the corporate powers of the company contracting, but the powers and rights of its individual corporators will be regarded. These principles are as follows: A corporation may sue in the Federal courts, where the citizenship of its members justifies it, and the fact is set forth by proper averments. While it is true that it can have no legal existence outside of the boundaries of the sovereignty by which it is created, and must dwell in the place of its creation, still its existence may be recognized in other places, and it may deal outside of the country of its creation, where it is so recognized by the law of the nation where the dealing takes place. Courts of justice have always expounded and executed contracts thus made, according to the laws of the places in which they were made; provided those laws were not repugnant to the laws or policy of their own country.

[1] *Bank* vs. *Earle*, *Bank* vs. *Primrose*, *Railroad Co.* vs. *Earle*, 13 Peters, 519.

[2] 13 Peters, 584–597.

This is the usual comity of nations. The States of the Union are sovereign; and both history and the events of daily occurrence show that they have adopted towards each other the laws of comity in their fullest extent, and we find proof in the legislation of Congress of the general understanding that by the law of comity between the States corporations chartered by one State are permitted to make contracts in other States. As a part of this comity includes the right to sue in the courts of a foreign nation, the same law of comity prevails among the several sovereignties of the Union. When the policy of a State is manifest, the courts of the United States are bound to notice it as a part of its code of laws, and to declare all contracts in the State repugnant to it illegal and void.

These principles of practical political wisdom of which this outline has been made, although commanding universal assent at present, were by no means received with easy acquiescence half a century ago. In the Supreme Court itself there was not unanimity of opinion, for Justice McKINLEY dissented in part. The decision itself was reviewed and confirmed a few years later.[1]

Pursuing the subject of the citizenship of the members of a corporation, and the proper mode of averring it, we finally reach a point in which the court decided[2] that a naked averment that a certain company was a citizen of a State was sufficient to give jurisdiction to the Circuit Court of the United States, because the company was incorporated by a *public* statute of the State which the court was judicially bound to notice. And we find the CHIEF-JUSTICE,[3] towards the close of his long career, his judicial light still burning brightly, reviewing all the cases showing the progress of the doctrine, and deciding that a suit by or against a corporation in its corporate name must be presumed to be a suit by or against citizens

[1] *Railroad Co.* vs. *Kneeland*, 4 Howard, 16.

[2] *Covington Drawbridge Co.* vs. *Shepherd*, 20 Howard, 227.

[3] *Ohio & Mississippi R. R. Co.* vs. *Wheeler*, 1 Black, 286.

of the State which created it; and no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the United States.

The growth and development of this doctrine have been interesting to trace and consider, and afford an excellent illustration of the time-honored maxim, *in fictione juris semper existit æquitas;* since it might in many cases have been difficult, if not impossible, to establish the citizenship of the different corporators in such manner as to be free from all technical objection to the jurisdiction.

Many cases in which the subject attempted to be treated in this address is more or less touched upon must necessarily be laid aside, by reason of the paramount importance of others, which should receive a full, and occasionally a somewhat elaborate, discussion. Several such are to be found in the fourteenth volume of Peters' Reports, and I extract one which, from its peculiarity deserves a passing notice, and in which Chief-Justice TANEY lays down, tersely and compactly, the rules by which it was decided. In *Bank of Alexandria* vs. *Dyer*[1] it was held that the county of Alexandria, in the District of Columbia, cannot be regarded as standing in the same relation to the county of Washington in the same district that the States of the Union occupy to each other. These counties constitute together the territory of Columbia, united under one territorial government; and residents of the county of Alexandria are not beyond seas in relation to the county of Washington, although, on a proper construction of the Maryland statute of limitations, the words *beyond seas* are equivalent to the words *without the jurisdiction of the State.*

The case of *United States* vs. *Morris*[2] involved the construction of an act of Congress prohibiting the slave trade, and for several reasons deserves consideration

[1] 14 Peters, 141. [2] 14 Peters, 464.

here. Chief-Justice TANEY, in delivering the opinion of the court, said that while, in expounding a penal statute, the court certainly would not extend it beyond the plain meaning of its words, yet the evident intention of the legislature ought not to be defeated by a forced and over-strained construction. The question was whether a vessel was "employed or made use of," within the meaning of the act of 10th May, 1800, in the transportation or carrying of slaves, etc., while she was on her outward voyage for the purpose of taking on board a cargo of slaves, but before any slaves were received on board. He held that the vessel was so employed, because she was *engaged for the purpose*, being under contract or orders to do this particular work. And his reasoning was illustrated by analogies drawn from other Acts of Congress. It is hardly necessary to add that this decision was unanimous.

An interesting phase of the controversy between the States of Rhode Island and Massachusetts, which has been before mentioned, is presented and ruled in an opinion of the CHIEF-JUSTICE, to the effect that the same rules of limitation which are applied to suits between private individuals cannot be enforced in controversies between political communities. Accordingly a demurrer to the bill, setting up a prescriptive title by possession, was overruled, and the defendant ordered to answer.[1]

The case of *Groves* vs. *Slaughter*[2] presents an interesting question growing out of the relation of slavery. By the Constitution of Mississippi, adopted in 1832, the introduction of slaves into that State, *as merchandise or for sale*, was prohibited after May 1, 1833. No law on the subject of this prohibition was passed until 1837. Certain slaves had been imported in 1835, as merchandise or for sale by a non-resident of the State, and a note given by the purchaser in payment. Upon suit in the Circuit Court of Louisiana upon the note, it was defended on the ground that

[1] *Rhode Island* vs. *Massachusetts*, 15 Peters, 233. [2] 15 Peters, 449.

it was void, as being in violation of the constitutional provision. It was held, however, by the court, that the Constitution required an act of the legislature to carry it into effect, and that no law having been passed for the purpose before 1837, the sale was valid and recovery could be had upon the note. The judgment was affirmed, the opinion of the Supreme Court being delivered by Justice THOMPSON, from which Justices STORY and MCKINLEY dissented.

The case deserves notice, not only from the nature of the points contended for and decided, but from the ability with which they were presented by the distinguished counsel engaged in the cause. On behalf of the defendant in error were found Mr. Clay and Mr. Webster, styled by their colleague Mr. Jones, the Ajax and Achilles of the bar; and Mr. Webster contended very earnestly that under the provisions of the Federal Constitution giving to Congress the power to regulate commerce the Act of the Mississippi Legislature was unconstitutional. It was held:

1. That the decisions of the Mississippi courts upon the construction of the clause of their own Constitution, were not so fixed and settled as to preclude the court from regarding it an open question.

2. That the Constitution of Mississippi did not, *proprio vigore*, execute itself, but required legislation for the purpose; and that, consequently, the sale and purchase of the slave was valid.

3. That this view of the case made it unnecessary to inquire whether the article of the State Constitution was repugnant to the clause of the Federal Constitution referred to.

Chief-Justice TANEY, concurring in the conclusion reached by the court, said he had not intended to express an opinion upon a question raised in the argument in relation to the power of Congress to regulate the traffic in slaves between the different States, because the court had

thought that the point was not involved in the case before it. But as one of the judges had expressed an opinion upon it, he was not willing, by remaining silent, to leave any doubt as to his own.[1] In his judgment the power over this subject was exclusively with the States; and each of them had a right to decide for itself whether it would or would not allow persons of that description to be brought within its limits from another State, *either for sale or for any other purpose;* and he thought that the action of the several States upon the subject could not be controlled by Congress, either by virtue of its power to regulate commerce, or by virtue of any other power conferred by the Federal Constitution. He declined expressing any opinion upon another question of constitutional law brought into discussion, but which was one step further out of the case before the court. This was whether the grant of power to the General Government to regulate commerce carried with it an implied prohibition to the States to make any regulations upon the subject, even although they should be consistent with those made by Congress.

Justice BALDWIN, whose opinion should be carefully considered,[2] was of opinion that the power of Congress "to regulate commerce among the several States," was exclusive of any interference by the States, and had been conclusively settled by the solemn decisions of the court in *Gibbons* vs. *Ogden*,[3] and in *Brown* vs. *Maryland*.[4]

In the opinion of the writer of these remarks, while the CHIEF-JUSTICE was probably correct so far as the question of sale and purchase was concerned, he went perhaps too far when, in his desire to uphold the rights of the States, he undertook to say that each of them had a right to decide for itself whether it would or would not allow persons of this description to be brought within its limits either for sale, *or for any other purpose*. This would have

[1] 15 Peters, 508–10.
[2] 15 Peters, 510–17.
[3] 9 Wheaton, 186–222.
[4] 12 Wheaton, 436–449.

prohibited the transit of slaves from one State where slavery was permitted to another such State, if accident or distress should have compelled the owner to touch at any place within a State where slavery did not exist, which is well put by Judge BALDWIN in his opinion. The CHIEF-JUSTICE'S remarks show, however, his anxiety to leave the whole subject of this peculiar domestic relation to the exclusive control of the States themselves. We shall have occasion, further on in our remarks, again to consider and call attention to his views in this respect.

The case of *Martin* vs. *Waddell*[1] involves a question of public law of so much interest, and was presented with so much force, both in the arguments of the distinguished counsel in the cause as well as in the opinion of the court delivered by Chief-Justice TANEY, and in the dissenting opinion of Justice THOMPSON, that I do not feel justified in passing it by. It arose under a conflict between two alleged grantees from the State of New Jersey, of certain mud-flats covered by the waters of the Bay of Amboy. From several propositions asserted in the judgment of the court, the following may be selected as sufficiently indicating the nature of the controversy, and the line of judicial reasoning adopted and leading to the conclusions reached:

1. The right of the king of Great Britain to make a grant of the soil beneath the navigable waters of Raritan River and Bay, where the tide ebbs and flows, included in the territory of the colony granted to the Duke of York, cannot, at this day, be questioned.

2. When the Revolution took place, the people of each State became sovereign, and held an absolute right to their navigable waters and the soil under them, subject only to the rights since surrendered to the General Government. Grants, therefore, made by the States must be tried and determined by different principles from those

[1] 16 Peters, 307.

which apply to grants of the British Crown, which are construed strictly.

3. While rivers, bays, and arms of the sea undoubtedly passed to the Crown's grantee, yet the public and common rights of fishery in navigable waters required very plain language to be included in the grant under the charter to the Duke of York.

4. The land under the navigable waters within the limit of the charter passed to the grantee as a royalty incident to the powers of government; and when a surrender was made by the proprietors, in 1702, to the Crown of *all powers, authorities, and privileges of and concerning the government of the province*, the rights in dispute were included. They were restored in the same condition in which they came to the Duke of York.

5. When the people of New Jersey took the sovereignty into their hands, the prerogatives and royalties, including the rights in question, which had belonged either to the Crown or to the Parliament, vested immediately in this State.

6. The effect of the judgment of the highest court of New Jersey upon these questions is very great, and in a case free from reasonable doubt should be conclusive.

The CHIEF-JUSTICE, after giving the history of the discovery of the country, the rules which applied to the ownership of the discovered country, and the grant by the Crown to the Duke of York, laid down the rules by which such grants were to be construed, which have been stated above. The great question was whether the dominion and property in the navigable waters of the province, and the soil under them, passed as part of the prerogative rights annexed to the political powers conferred upon the proprietary, or whether they were granted as private property to be parcelled out and sold to individuals for the benefit of the grantee. From a consideration of the laws and institutions of England, the history of the times, the object of the charter, the contempora-

neous construction given to it, the usages under it for more than a century, it would seem that the title to the soil under the navigable rivers did not pass as private property, even under words apt for the purpose of the conveyance of such rights in ordinary grants. These rights remained in the dominion and ownership of the State, as part of the prerogative rights annexed to the political powers conferred upon the original proprietary grantee of the Crown to which the State had succeeded.

Much, doubtless, may be urged in favor of this judgment of the Supreme Court, which came to the same conclusion that had been reached by the highest court of the State of New Jersey. Nevertheless, it may be said that the dissenting opinion of Justice THOMPSON,[1] concurred in by Justice BALDWIN, puts the argument very powerfully against the pretensions of the State of New Jersey whose claim in the present case appeared to be inconsistent with its own course of practice. It is believed that the practice of the land offices of several of the States is in accordance with the views expressed in the opinion of Justice THOMPSON, and that the title to the soil lying under the bed of navigable rivers has not infrequently been granted to private individuals. This case coming up again, the same judgment was pronounced, *Martin* vs. *Waddell* being affirmed.[2]

In the famous case of *Prigg* vs. *Commonwealth of Pennsylvania*,[3] in which all the judges appear to have agreed that the Act of Assembly of Pennsylvania of the 25th March, 1826, under which the plaintiff in error was convicted of kidnapping, was unconstitutional, the CHIEF-JUSTICE dissented from the view taken in the opinion of a majority of the court, delivered by Justice STORY, that the power of legislation in relation to fugitives from labor was exclusive in the Congress of the United States. With much force of reasoning he endeavored[4] to show that as it was

[1] 16 Peters, pages 418–434.

[2] *Den ex. d. v. Jersey Company*, 15 Howard, 426.

[3] 16 Peters, 539.

[4] 16 Peters, 626–33.

a duty injoined upon the individual States to protect and inforce the privileges and immunities of citizens in the several States, and as the right in question, of reclaiming fugitive slaves, stood on the same grounds and was given by similar words, it should be governed by the same principles. Justices THOMPSON and DANIEL concurred in the dissent upon this point.

As this case is by many constitutional lawyers looked upon with disfavor, it may not be amiss to give an analysis of the opinions of the judges who sat in the cause, and to refer to the legislation which took place not very long afterwards. First, although the doctrine of the case is sometimes said to have made an unjustifiable assault upon the integrity of State legislation in the exercise of an undoubted right of providing proper police regulations for the protection of its citizens, it is worthy of note that ALL THE JUDGES CONCURRED in opinion that the law under which the plaintiff in error was indicted, was unconstitutional. A majority of the court held that the power was exclusive in Congress to legislate upon the clause of the Constitution in question. Three of the judges, including Justice THOMPSON, of New York, thought that the States might legislate in aid of the objects intended to be secured by the constitutional provision; and one judge, BALDWIN, believed that legislation from any source was unnecessary, since the Constitution conferred upon the owners of fugitive slaves all the rights of seizure and removal which legislation could give.[1] On the other hand, Judge MCLEAN held, with much show of reason, that it was inadmissible to contend that the fugitive from labor could be removed by the person claiming him except in the manner pointed out by the Act of Congress, which the master was bound to pursue. He endeavored to show that there was no conflict between the Act of Congress and the State law in this respect, and remarked that the latter contained an important police regulation, the provisions of which were most valuable for the protection of its citizens.

[1] 16 Peters, pages 636, 637, opinion of Justice Wayne.

It might be rather inferred from this eminent judge's remarks, notwithstanding the statement of Justice WAYNE already referred to, that although he did not dissent in terms from the judgment of the court, yet he thought there was no conflict between the State law and the Federal Constitution; and that had it not been that the decision of the Supreme Court of Pennsylvania was *pro forma*, and the case made up merely to bring the question before the Supreme Court of the United States, he might have expressed a more formal difference of opinion upon this point.

By the Act of Congress of 18th September, 1850, commonly called the Fugitive Slave Law,[1] it was attempted to meet some of the objections made to the decision just noticed, and to strengthen the rights and facilitate the remedies for the recovery of these fugitives from labor. It gave concurrent jurisdiction with the judges of the Federal courts to commissions appointed to decide upon the claim of the owner of the alleged fugitive upon a warrant issued for his apprehension. It made it the duty of the owner, or his agent apprehending the fugitive, to take him forthwith before the judge or commissioner, whose duty it became to hear and determine the case in a summary manner, and to give a certificate of his judgment to the claimant. It forbade the testimony of the alleged fugitive to be admitted in evidence, and made the certificate of the person in whose favor it was granted authority for the purpose of removing the fugitive to the State from which he had escaped. It created stringent penalties for attempting to molest the claimant or rescue the fugitive from his custody, and it authorized such claimant, when he apprehended a rescue, to compel the officer making the arrest to retain the fugitive in his custody, for the purpose of removing him to the State whence he had fled. Notwithstanding that this law was obviously in the strict line of the constitutional provision upon the subject, and

[1] United States Statutes at Large, vol 9, page 462.

avoided the most obnoxious part of the decision just noticed, relating to the right of the claimant to seize and remove the alleged fugitive, wheresoever found, without jndicial process at all, it met with strong opposition in its passage through the two branches of the Federal legislature, and after its passage, in its execution in many of the Northern States. In the State of Pennsylvania, in particular, it gave rise to a trial for high treason in a case where it was contended that there was a concerted plan to prevent its execution.

In truth, the subject lay beyond the domain of legislative or judicial action. The feeling is so deep-seated in the hearts of men to comment upon unfavorably, and to prevent if possible the exercise of all authority distasteful to their passions or their prejudices, that it is impossible to reason with it, or even to contend against it, except by the exercise of physical force. Especially is this so in free countries, and particularly in one where the general level of intelligence is high, and the means for concerted action abundant by reason of the ability for the almost instantaneous propagation of the thoughts and opinions of the general mass. In vain shall you attempt to appeal to the reason or patriotism of men thus aroused. You may demonstrate with unerring truth that the Constitution is incapable of more than one construction upon the point in question, and you may show with the clearness of the noonday sun that this construction favors the obnoxious practice. You may further prove from the history of the times, with an accuracy which admits of no challenge, that the compact by which the several States were fused into one united body would never have taken place without the concession which is found enacted into words in the instrument of union. You may talk of duty, justice, fairness, submission to the laws; but you talk against the wind in doing so. When men's passions are aroused they no longer reason. Passion is at one end of the line, reason at the other, and the latter is always out-

weighed by the former. Men simply rely upon their feelings as their principle of action ; and especially do they do this when they can indulge in the luxury of gratifying these feelings without expense to their pockets. Adam Smith wrote, nearly a hundred years ago, that the resolution by which our ancestors in Pennsylvania set at liberty their negro slaves, must satisfy us that their number then could not have been very great in that State, and before making this statement he had demonstrated "that the work done by slaves, though it appears to cost only their maintenance, is in the end the dearest of any kind of labor."

The principle to which the great philosopher of modern times attempted to reduce all the motives and actions of human conduct, that of UTILITY, is always the safest, and indeed the only guide to appeal to in the resolution of questions of this kind. If the slaveholding States had believed that in the long run the Union was more advantageous to them, even without the practical carrying into effect of the provision of the Constitution in question, they should not have attempted the enforcement of a provision so unpopular in the North. Had the people of the non-slaveholding States regarded the value of the Union as superior to the enforcement of an unpopular provision, they would readily have acquiesced in submission to its requirements. The fault on both sides was a blunder of proportion in their moral and mental vision. The inestimable advantages of the Union not being brought instantly to their apprehension, were relegated to distant consideration, or rather were placed out of view altogether. The immediate inconveniences—on the one side, of loss of service of a few runaway slaves, and on the other, of restoring to bondage those who had successfully escaped from it—were magnified with an intensity out of all importance to their value. And the ill-feeling thus created led to the conflict, from which we have, it is to be hoped, emerged, with wiser resolves for the future,

and with more permanent strength of devotion to a government which alone can unite and harmonize all the energies of the people of this continent.

Let us continue in the path of our progress.

It seems a little odd that the very next case[1] in the Reports is one accidentally omitted by the former reporter, in which the CHIEF-JUSTICE, delivering the unanimous opinion of the court, pronounced judgment in favor of the freedom of a slave. The case was this: A testatrix bequeathed certain slaves to a legatee, with a proviso that he should not carry them out of the state of M., or sell them to any one; in either of which events the testatrix willed that the said negroes should be free for life. The legatee sold one of them, and on a petition being filed by him for freedom in the Circuit Court of the District of Columbia, it was held he became free. This judgment was affirmed by the Supreme Court, which ruled that the bequest of freedom to a slave stood, under the laws of Maryland, on the same principles with a bequest over to a third person, and was a specific legacy. The proviso was not a restraint upon alienation inconsistent with the right to the property bequeathed, but was a conditional limitation of freedom, and took effect the moment the slave was sold. It is interesting to look at the line both of statute laws and decisions in States in which this institution then prevailed, given in the argument of the counsel for the petitioner, the pervading spirit of which is in favor of the claim for freedom.

Where the extent and nature of existing remedies are so materially changed by statute as to impair the rights and interests of the parties to a contract, the Supreme Court has steadily adhered to the ruling that this is as much a violation of the compact as if directly overturned. In *Bronson* vs. *Kinzie*,[2] the CHIEF-JUSTICE applied this principle, while conceding the difficulty of drawing the line between an immaterial modication of the remedy,

[1] *Williams* vs. *Ash*, 1 Howard, 1. [2] 1 Howard, 311.

and the case of the remedy being so incumbered with conditions as to render it impracticable to pursue. In the case in hand, it was held that a State law passed subsequently to the execution of a mortgage declaring that the mortgagor's equitable estate should not be extinguished for twelve months after a sale under a decree, and preventing any sale unless two-thirds of the amount of an appraised value should be bid therefor, is within the clause of the Federal Constitution prohibiting a State from passing a law impairing the obligation of a contract. Justice McLEAN dissented, thinking these stay laws capricious, but not violative of the obligation of the contract.

A somewhat extraordinary attempt to deplete the public treasury made in a case about to be mentioned,[1] which was, however, only temporarily successful, arose under the following circumstances: The French Government, had agreed by treaty to pay certain sums of money to our government, and after conference between the Secretary of the Treasury and the officers of the Bank of the United States, then a government institution, it was thought that the best mode of collecting the amount would be through the drawing of a bill, for the instalment then due, by the Secretary upon the Minister of Finance of the kingdom of France, the bank to become the purchaser thereof and present it for payment through its foreign correspondent. This was accordingly done, and the bill not having been paid upon presentation, it was protested, and taken up for the honor of the bank by its French correspondents. In an account afterwards stated between the bank and our governmeut, the bank claimed by way of offset the amount of fifteen per cent. allowed as damages to the holder of a bill under the Maryland statute against the drawer, upon non-payment thereof. This claim was refused in the Circuit Court, but allowed by the judgment of the Supreme Court, upon error to

[1] *Bank of U. States* vs. *United States*, 2 Howard, 711.

the lower court, the opinion being delivered by Justice McLEAN.[1] As the CHIEF-JUSTICE when Attorney-General had given an opinion adverse to the bank's claim, he did not sit during the argument; but thinking it due to himself to state at length the reasons which still caused him to believe that the claim was illegal and unjust, he then presented them, and they are to be found in the appendix to this volume of Reports.[2]

In this elaborate presentation of the views of the CHIEF-JUSTICE it was shown at considerable length, and with much clearness of statement, that the bank's claim for damages was not based upon a bill of exchange in the usual and ordinary sense, since our government had no right to require the French Government to pay in this way any instalment of moneys due under the treaty. And so conscious was our government of this at the time, that, in addition to the bill, it gave to the cashier of the bank a special power of attorney to receive the amount of the bill from the French Government. It was equally clear that that government was not bound to repay these damages to the United States. Nor was the intervention of the bank that of the purchaser of a bill at all, but as the fiscal agent for our government, as was abundantly shown from the correspondence between its officers and the Secretary of the Treasury. Nor had the Maryland statute imposing the fifteen per cent. damages as a penalty upon the drawer of the bill for its non-payment upon presentation, any application to the United States as the drawer of this alleged bill. It would be the first instance in the history of nations in which a sovereignty had imposed upon itself a penalty in order to compel it to be honest in its dealings. In England the king is not included in an act of Parliament, and the State of Maryland would not have been liable to this demand. Moreover, as the bill was drawn upon a particular fund, the individual drawer would not have been liable,

[1] 2 Howard, 733–38.

[2] 2 Howard, Appendix, pages 745–68.

as the draft for this reason was not technically a bill of exchange. Both the Secretary of the Treasury and the bank knew at the time of the drawing that France, being a constitutional government, could not apply any money to this or any particular purpose without a legislative appropriation. Finally, the bank was not the owner or holder of the bill in the sense in which damages are given to a holder of a draft for non-payment upon its presentation, since it had not been put to the inconvenience which the holder of a draft in a foreign country suffers from its non-payment, and for which the damages are imposed by way of penalty.

No apology is needed for calling attention to this case, as the views of the CHIEF-JUSTICE give a remarkably lucid summary of the law upon a question which entered the domain of the law of nations, and involved many interesting points of public law. It is proper to add that these views were subsequently sustained when the case again came before the court.[1]

I now desire to draw attention, briefly, to a case which arose under the Tariff Compromise Act,[2] for the sound views expressed in it by Chief-Justice TANEY, as to the difference between the functions of the law-maker and the law-expounder. It was held that in construing Acts of Congress the court will not consider the motives, opinions, or reasons expressed by individual members in debate, but, if necessary, will look to the public history of the times in which the law was passed. Nor should the judiciary give an over-technical construction to doubtful words, which would make the legislature inconsistent with itself.

In the case of *Searight* vs. *Stokes*[3] the construction of the Acts of Congress ceding to Pennsylvania that part of the Cumberland road within that State, and the Acts of Pennsylvania accepting the surrender, came up for con-

[1] *United States* vs. *Bank of United States*, 5 Howard, 382.

[2] *Aldridge* vs. *Williams*, 3 Howard, 9.

[3] 3 Howard, 151.

struction, and the Supreme Court held, through the CHIEF-JUSTICE, that in interpreting these acts, the character of the high contracting parties, the relation in which they stood to one another, and the objects they had in view, must all be considered. From this point of view it could not have been supposed that it was the intention that our General Government was to pay tolls upon the mail matter carried over the road. But upon all other property, although contained in the same vehicles, and upon all persons, except those engaged in transporting the mails, travelling in the same, the State might lawfully impose the same charges imposed upon other persons and vehicles of the same kind. There were dissents from this ruling, expressed by Justices MCLEAN and DANIEL.

In a case arising out of the cession of that part of the road lying within the limits of Ohio, and the State legislation accepting the same,[1] upon the presentation of the same substantial question, the court adhered to the views already expressed, and decided that tolls charged upon passengers travelling in the mail coaches not charged against passengers travelling in other coaches, were against the contract, and void, and that while the frequency of the departure of coaches carrying the mails was not an abuse of the privilege of the United States, yet an unnecessary division of the mail matter among a number of coaches, was.

A check was again given to extreme views of construction in regard to the impairment of the obligation of contracts by State legislation, in a case now to be noticed.[2] The facts were as follows: The State of Maryland passed an act directing a large money subscription to the capital stock of the Baltimore and Ohio Railroad Company, *provided* "that if the company shall not locate its road in the manner provided in the act, it should forfeit $1,000,000 to the use of W. County." By a subsequent

[1] *Neil, Moore, & Co.* vs. *State of Ohio*, 3 Howard, 720.

[2] *State of Maryland* vs. *Balt. & Ohio R. R. Co.*, 3 Howard, 534.

act, so much of the first act as made it the duty of the company to construct the road by the route prescribed was repealed, and the penalty was remitted and released. Suit was brought for the penalty, and the Supreme Court held, through the CHIEF-JUSTICE, that the second Act of Assembly did not impair the obligation of a contract, as the clause of the first act was simply the imposition of a penalty by the State, which it had the right to remit, even after suit for its recovery had been begun.

The reasoning of the CHIEF-JUSTICE is marked by breadth of view, intelligent discrimination, and the application of sound principles of law to the case.

The decision of the court in *United States* vs. *Rogers*[1] gives a compendium of the principles asserted by our government in regard to the territory included within the limits of the United States, and the aboriginal inhabitants thereof. These principles, set forth by Chief-Justice TANEY, in a brief, lucid, and forcible opinion, may be stated as follows: 1. The territory was divided and parcelled out, as if it had been vacant land at the time of its discovery. This question is no longer an open one, but, if it were— 2. It would be one for the law-making and political departments of the government, not for the judiciary. 3. The Indian tribes residing within the territorial limits of the United States are subject to their authority. 4. The Act of 30th June, 1834, section 25, extends the United States laws over the Indian country, with a *proviso* that they shall not include punishment for *crimes committed by one Indian against the person or property of another*. 5. But this proviso does not embrace the case of a white man adopted into an Indian tribe at mature age. 6. The treaty with the Cherokees made in 1835, is explained and controlled by the Act of 30th June, 1834. 7. Hence, a plea set up by a white man adopted in the manner stated, that he was not subject to the jurisdiction of the Federal Circuit Court, is invalid.

[1] 4 Howard, 567.

The case of *United States* vs. *King*[1] contains so excellent a statement of the principles by which our courts should be controlled in dealing with titles derived under foreign governments, that I do not feel disposed to pass it over, even at the risk of adding unduly to these remarks. It arose under an alleged grant from French officials before the purchase of Louisiana by our government. After the court had decided that a certificate of survey alleged to have been given by Trudeau on the 14th June, 1797, was antedated and fraudulent, Chief-Justice TANEY remarked, that while it was undoubtedly true in a general sense that where spurious instruments are delivered by a government to persons dealing with it on their faith, they cannot afterwards be impeached by such government, and that fraud should not be imputed to the officials of a foreign government where their conduct has not been questioned by the authority under which they were acting and to which they were responsible, yet this proposition must not be limited to the case where no other interest is concerned, except that of such government and its own citizens. There is, moreover, a *prima facies* in favor of the honesty and good faith of the official acts of an officer acting in the line of his duty. But the doctrine of comity usually extended to tribunals and officers of foreign governments, cannot be pushed to the extent of claiming for them a total exemption from inquiry, when their acts *affect the rights of another nation and its citizens.* The United States have never acknowledged this immunity from inquiry; and in every law establishing American tribunals to examine into the validity of titles to land in Louisiana and Florida derived from the Government of Spain, they are expressly *injoined to inquire whether the documents produced in support of the claim are antedated or fraudulent.* It is the duty of the court to hear and determine whether the certificate in question, although recognized and sanctioned by the

[1] 3 Howard, 773.

colonial authorities of Spain, *is antedated* and made out *either with or without their privity*, in order to defraud the United States, and deprive them of land which rightfully belonged to them under the treaty.

It cannot be seriously questioned that the rule laid down by the CHIEF-JUSTICE, although doubtless bearing hard occasionally upon innocent purchasers for value, contains the only true solution of the difficulties surrounding such grants; or, that to have sanctioned the course so earnestly contended for by the parties claiming under these spurious titles would not have been fraught with the gravest injustice to the rights of our own government and its grantees.

The case came up again on a writ of error taken by the other side,[1] and was very hotly contested; but the principles above enunciated were again affirmed by a closely divided court.

I hope I may be pardoned for very briefly noticing the case of *Hunt* vs. *Palao*,[2] which presents an interesting point of practice, ruling that a writ of error will not lie to review the judgment of a defunct Territorial Court of Appeals, its proceedings being no longer in the possession of any court authorized to exercise judicial power over them.

Nor may it be amiss to notice, in the same manner, the case of *Barry* vs. *Mercein*,[3] in which it was decided that the Supreme Court has no appellate jurisdiction, where the Circuit Court of the Southern District of New York refused to grant a writ of *habeas corpus* to bring up the body of an infant child, as the matter in dispute necessary to give jurisdiction must exceed in value $2,000, and such a controversy relates to a matter incapable of reduction to a pecuniary standard of value.

Notice should here be taken of a subject frequently before the court, and upon which its different members seem to have entertained conflicting opinions: I mean

[1] 7 Howard, 833. [2] 4 Howard, 589. [3] 5 Howard, 103.

the subject of State bankrupt or excise laws, and their operation beyond their territorial limits. In *Cook* vs. *Moffat*,[1] it was held that a contract made in New York was not affected by the discharge of the debtor under the insolvent laws of Maryland, in which State the debtor resided, although the law was passed *antecedently* to the making of the contract. The opinion of the court was pronounced by Justice GRIER, who reviewed the prior decisions, and asserted that the doctrine to be extracted from them was as follows: 1. The States had authority to pass bankrupt laws; *Provided*, no system of bankruptcy was in force under Federal legislation; 2. *Provided*, such laws did not impair the obligation of contracts. 3. Hence, State bankrupt laws could not act upon contracts previously made; 4. or *beyond their own territory*.

Several of the other judges gave opinions, expressing views more or less in conformance with those expressed in this opinion; and TANEY, C. J.,[2] concurring in thinking that the States could pass bankrupt laws in the absence of Federal legislation, thought also that such laws when passed could not be regarded as violative of the Constitution because they might operate *extra-territorially*. Such operation was exclusively a matter of comity. He referred to the opinion of Judge JOHNSON, in *Ogden* vs. *Saunders*, and to that delivered by Judge STORY, in *Boyle* vs. *Zacharie*,[3] as giving the correct history of the former opinion. The CHIEF-JUSTICE'S views upon this interesting question seem to be so obviously correct that it is a matter of surprise that they did not receive the concurrence of the entire court.

The great case of *Waring* vs. *Clarke*,[4] in which it was held that the grant in the Constitution extending the judicial power "to all cases of admiralty and maritime jurisdiction," is neither to be limited to, nor interpreted by, what were cases of admiralty jurisdiction in England

[1] 5 Howard, 295.
[2] 5 Howard, 309–11.
[3] 6 Peters, 641.
[4] 5 Howard, 441.

at the time of the adoption of the Constitution, must be here chronologically referred to (1847), although the CHIEF-JUSTICE gave no opinion, simply concurring with the majority of the court, whose opinion was delivered by Justice WAYNE; which judgment, it may be said, has received the cordial approval of the profession, notwithstanding the learned and elaborate dissents from it at that time, and was the precursor of the extension of the admiralty and maritime jurisdiction of these courts over the waters of the great lakes.

In the cases now about to be referred to, the first of a long series running in the same general direction, the constitutionality of State license laws imposing penalties upon the unlicensed retail sale of vinous or spirituous liquors, was considered, and to the extent of the legislation adopted by the States in question, established. Three cases, coming up from three several States, were considered together, and after a second argument, the judgments of the State courts were all affirmed. The cases will now be stated.[1]

It was held that the license laws of these States providing under penalties that no person shall retail or sell vinous or spirituous liquors in a less quantity than (a certain number of gallons), unless they are first licensed, and that licenses shall not be granted when, in the opinion of the parties selected to grant them, the public good does not require their granting, are not inconsistent with the provisions of the Federal Constitution, or of any Act of Congress under it. And that although *in one case* the purchase and sale was of liquors duly imported from a foreign country, and purchased from the original importer by the party indicted, and in another case the article sold was a barrel of American gin purchased in Massachusetts and carried coastwise to New Hampshire and there sold in the same barrel.

[1] *Thurlow* vs. *Mass.*; *Fletcher* vs. *R. Island*; *Pierce* vs. *N. Hampshire*, 5 Howard, 504.

Chief-Justice TANEY announced the decision of the court affirming the judgments of the respective State courts, saying that as the justices did not altogether agree in the principles upon which the cases were decided, he would proceed to state the grounds upon which he concluded in affirming the judgments.

The two cases depended upon the same principles; the last case differed somewhat, but there were important principles common to all, which made it convenient to consider them together. His reasons were that the power of Congress to regulate commerce did not extend further than its regulation *with* foreign nations and *among* the States. Every State might regulate its own internal traffic according to its views of the interest and well-being of its citizens. He then reviewed *Brown* vs. *Maryland*, 12 Wheaton, 419. In that case it was held that when a package sold by an importer passed into hands of a purchaser, it ceased to be an import, and might be taxed by the State; although so long as it remained in the hands of the importer, no State could either directly or indirectly impose any tax or burthen upon it. That decision *he was then convinced was right*.

Applying this rule to the case before the court, no State has the right to prohibit the importation of spirits or distilled liquors, but it may act upon them after they are offered for sale by restraining the traffic in them.

As to the State of New Hampshire, the question was whether a State is prohibited from making regulations of foreign commerce, or of commerce with another State, although such regulations are confined to its own territory, and do not conflict with any law of Congress. The mere grant of power to the General Government cannot be construed to prohibit the exercise of power over the subject by the States. A State may, for protection of the health of its citizens, make just regulations, etc., unless in conflict with Federal legislation. The State Quarantine and Laws relating to pilotage were referred

to in this connection. Former decisions of the Supreme Court were then considered, particularly the decision in *Gibbons* vs. *Ogden*. Cases of bankruptcy, militia, and naturalization were also considered.

This opinion of Chief-Justice TANEY is a calm, judicial, and (in my opinion) convincing presentation of the entire subject.

Justice MCLEAN, in the case against the State of Massachusetts, thought the case clear for affirmance. In the case against New Hampshire he was also for affirmance, and in the case against Rhode Island he was also for affirmance, although in his opinion he was somewhat inconsistent with the views expressed by him in *Prigg* vs. *Pennsylvania*, in 16 Peters, and perhaps in other cases.

Justice CATRON was for affirmance of the judgments in all three cases, for reasons given by him. Justice DANIEL concurred in the decision of the court so far as it established the validity of the license laws of all three States; but he differed as to some points which he thought unnecessary for the decision. Justice NELSON concurred in the opinions delivered by the CHIEF-JUSTICE and Justice CATRON. Justice WOODBURY concurred in the conclusion reached as to the judgments in all the cases, but differed as to some of the views expressed. He seemed to concur in general, however, with the views of the CHIEF-JUSTICE, and of Justice CATRON. Justice GRIER concurred in the judgment in all the cases and generally with the views of Justice MCLEAN in the first case against Massachusetts.

In the celebrated case of *Luther* vs. *Borden*,[1] in which was involved the right of the freemen of a State to change their form of government, a majority of the court, its opinion being delivered by the CHIEF-JUSTICE, held that this was a political question, and not the subject of judicial cognizance, and that the powers that be must be regarded as the lawful State government. After asserting

[1] 7 Howard, 1.

the gravity of the case, the CHIEF-JUSTICE went on to say that it was in its nature of necessity a political and not a judicial one. If a State Court should enter upon such an inquiry, and come to the conclusion that the government under which it acted had been displaced, it would cease to be a court of justice, and incapable of pronouncing a decision upon the question. A court constituted under a State government admitted on all hands to be lawful, has established this principle, and the United States courts are bound to follow it. The old (charter) government must therefore be regarded as the lawful government of Rhode Island. Moreover, the President of the United States recognized the governor under the charter government as the executive power of the State. A question very similar arose in *Martin* vs. *Mott*, 12 Wheaton, 29. The grounds of that decision were conclusive.

It is difficult to see how any other view than the one presented in this opinion could be taken, without involving the subject in inextricable difficulties. There seems to be no escape from the conclusion reached by the majority of the court, although it may perhaps be conceded that from its adoption great hardships and some injustice might ensue. Nevertheless, it appears to us that the balance of convenience is very clearly on the side of the judgment of the Supreme Court. It is to be noticed, however, that Justice WOODBURY dissented in a very elaborate opinion, and that Justices CATRON, DANIEL, and MCKINLEY were all absent.

I now recur to the judgment pronounced in the cases known as the Passenger Cases,[1] in which four of the judges, including Chief-Justice TANEY, dissented from the judgment of the Supreme Court which declared that the statutes of the States of New York and Massachusetts imposing taxes upon alien passengers arriving in the ports of those States were contrary to the laws and the

[1] *Smith* vs. *Turner*, *Norris* vs. *City of Boston*, 7 Howard, 283.

Constitution of the United States. The opinion of the court was given by Judge McLEAN, in which Judges WAYNE, CATRON, McKINLEY, and GRIER, who all gave opinions, concurred.

This case is so important, that a pretty full examination of it will probably not be deemed out of place. The dissent of four of the nine judges deserves close consideration not only from their individual eminence, but from the importance of the grounds upon which the dissenting opinion rests. The CHIEF-JUSTICE begins by considering the Massachusetts case and attempting to show the legality of the first two sections of its statute which require a State officer to board a vessel arriving within its limits, examine into the condition of its passengers, and if any lunatic, idiot, maimed, aged, or infirm person incompetent to maintain themselves be found on board, forbidding such passenger to land until the master, owner, or agent of the vessel shall give bond that no such person shall within ten years become a charge upon the State. The *third section* enacts that no alien passenger (other than those just mentioned) shall be permitted to land, until the master, owner, or agent shall pay to the boarding officer the sum of *two dollars* for each passenger so landing, the money so collected to be appropriated to the support of foreign paupers. This law, the CHIEF-JUSTICE asserts, is part of the pauper laws of the State and compels no one to pay the sum mentioned. The passenger can remain on board if he will. Nor is the money demanded of him. It is the captain or owner, etc., who is to pay it. First, can the Federal Government compel the several States to receive every person, or class of persons, whom it may be its policy or pleasure to admit? This question lies at the foundation of the controversy; it is discussed fully, and it is shown that the Federal Government has never asserted this power, and that no clause of the Constitution justifies such an assertion. 1. There is no treaty or Act of Congress requiring this. 2. As the right of every

State to remove from its midst dangerous or objectionable persons cannot be questioned, it follows necessarily that the power to exclude them in advance exists. 3. If it can exclude them altogether, it may admit them on certain conditions; there is nothing which requires absolute admission or absolute exclusion. 4. It had been supposed that this question had been settled by the decisions of this court in *Holmer* vs. *Jennison*, *Groves* vs. *Slaughter*, *Prigg* vs. *Penna.*, 14 Peters, 540; 15 Peters, 449; and 16 Peters, 539.

If it be objected, however, to the law in question, that it interferes with the regulation of commerce by Congress, the opinion in the License Cases answers this objection. A review of the Act of Congress of March 2, 1799, chapter 23, section 106, is then made, and it is shown that this law refers to exemption from duties of certain articles of passengers, and is obviously inapplicable. So the first article of the Convention of July 3, 1815, with Great Britain. So the Act of Congress of 1819, regulating the number of passengers which may be taken on board ships, etc. This last act fairly denotes the line of division between the two sovereignties. The law of Massachusetts attempts no regulation of trade or commerce. No tonnage duty, or tax upon passengers for entering the waters of the country is prescribed. It is simply to protect against the evils of pauperism. The clause in the Constitution (Article I., section 9) as to the non-prohibition before a certain date of the migration or importation of persons which the States may think proper to admit, applied solely to the introduction of slaves. A discussion of this, from the historical and political sides, is made, showing that the present view is an attempt to pervert and invert its meaning. And the question of the tax being a duty or impost on imports is also discussed. In this connection *Miln* vs. *New York*, 11 Peters, 102, is quoted as an authority that passengers are NOT imports. But supposing *passengers* are *imports*, a State may exam-

ine, inspect, and lay a duty to pay for the necessary expense of inspection. Any surplus over such expense goes directly into the Federal Treasury.

It is said, however, that the charge imposed is a tax on the captain of the vessel, and is therefore a regulation of commerce. The Chief-Justice assented to the doctrine of *Gibbons* vs. *Ogden*, but the power to regulate commerce does not give to Congress the power to tax commerce, and does not prohibit the States from taxing it in their own ports and within their own jurisdiction. He then cited the thirty-second number of *The Federalist*, and quoted from Chief-Justice MARSHALL in *Gibbons* vs. *Ogden*, page 201 of the Report. As passengers are not *imports*, the tax on passengers (if a tax at all) is not a tax on the captain of the vessel, and consequently not a tax upon (an instrument of) commerce. The naturalization laws have nothing to do with the question. As to the *New York case*, their law requires every passenger from a foreign port to pay tax. All such passengers are treated alike. This is an equal burthen on all. It is nothing but a quarantine, or police regulation. It is said, however, that COMMERCE means INTERCOURSE. If this means *more* than *Commerce*, then the word should not be interpolated into the Constitution. If it means the same, the word has been judicially interpreted.

Full as the outline here given is of the dissenting opinion of Chief-Justice TANEY in these cases involving the rights of the individual States to protect themselves from the importation of disease and pauperism into their midst, it cannot be considered as too full in an attempt made to exhibit the proper construction of the Constitution of our common country through a presentation of the opinions of a judge who presided so long over its highest court. Although the judgment then pronounced was hostile to the legislation of the States upon this subject, it undoubtedly resulted in an effort to remedy the evils complained of by means of Federal legislation.

We pass from the subject to notice a doctrine of the Supreme Court which, with the modifications which have been made upon it, may be considered as the established doctrine of this court. The following cases fully illustrate it[1]; and from them we may conclude that the Federal courts will follow the decisions of the State courts in the construction of their own statutes, where that construction has been settled by the decisions of their highest judicial tribunal, *with the remarkable qualification* about to be noticed; namely, that the Federal Supreme Court will not recognize as binding upon it the decision of the highest State court upon a *private act*, such decision being no part of the local law of real property. The highest court of the State of New York had decided that certain sales made in a certain way under the alleged authority of a private act of the legislature passed a valid title to the purchaser. The Supreme Court of the United States examined into the facts of this case and declared that the sales in question were irregular and void and passed no title to the vendee. From this judgment Chief-Justice TANEY dissented with Judges CATRON and NELSON, the last-named judge delivering an elaborate dissenting opinion.

This case deserves notice from the extraordinary position taken in the opinion of the court as to its right to discriminate between *private* and *public* statutes of a State, and the decisions of the courts of the same State thereon upon a question involving title to real estate; and has the appearance rather of a rescript intended to meet some supposed hardship or want of equity believed to be found in some part of the case than as a judgment based upon precedents, and following the accustomed line of reasoning adopted in similar branches of jurisprudence. It can hardly be doubted at the present day that the reasons given by Judge NELSON, and concurred in by the CHIEF-

[1] *Nesmith* vs. *Sheldon*, 7 Howard, 812; *Williamson* vs. *Berry*, 8 Howard, 495; *Same* vs. *Ball*, 8 Howard, 566.

JUSTICE, and Judge CATRON for their dissent, must receive the approval of every constitutional lawyer, and leave the law in the condition in which it was before the judgments in the cases in 8 Howard.

In *Strader* vs. *Graham*[1] it was ruled, apparently unanimously, the CHIEF-JUSTICE delivering the opinion, that as the Constitution of the United States cannot control the laws of a State upon the domestic and social condition of persons domiciled within its territory, it follows that the Federal Supreme Court has no jurisdiction over the question "whether slaves permitted to pass occasionally from Kentucky to Ohio acquired thereby the right of freedom after their return to Kentucky." It was also held that the ordinance of 1787 conferred no jurisdiction upon the court, as it was superseded by the Constitution. The decision was apparently unanimous.

The rights of neutrals were touched upon in the case of *United States* vs. *Guillem*,[2] in which it was held by the CHIEF-JUSTICE, that a neutral leaving a belligerent country in which he was domiciled at the commencement of war is entitled to the rights of a neutral both in *person* and *property* as soon as he sails from a hostile port. Nor is the property taken with him liable to condemnation for breach of blockade by the vessel in which he embarks when entering or departing from port, *unless he knew of the intention* of the vessel to break the blockade in going out.

I notice the case of *Reeside* vs. *Walker*,[3] because of its foreshadowing the doctrine that no judgment in set-off can be entered against the United States, as it occurred during the presidency of the CHIEF-JUSTICE, although the opinion of the court was not delivered by him.

In *Dinsman* vs. *Wilkes*,[4] Chief-Justice TANEY, delivering the opinion of the court, laid down some very sound

[1] 10 Howard, 82. [2] 11 Howard, 47. [3] 11 Howard, 272. [4] 12 Howard, 390.

principles by which the conduct of the commander of a squadron must be governed, holding that he has the power to detain a marine after the expiration of his term of enlistment, if, in his opinion, the public interests require it; and that his opinion must be final and conclusive. He must be the judge of the degree of punishment necessary to suppress disobedience and insubordination; nor is he liable for an error of judgment, although he must not inflict a severer punishment than is necessary for the maintenance of discipline. His motives are to be considered by the jury.

In heretofore mentioning the case of *Waring* vs. *Clarke*, it was spoken of as containing an adumbration of the important doctrine by which the jurisdiction of the Federal courts in admiralty and maritime cases arising upon the great lakes was sustained as constitutional. In the year 1851 [1] this doctrine was asserted in an able and elaborate view of the subject presented in the opinion of the CHIEF-JUSTICE, which was adopted by all the members of the court except Judge DANIEL, who adhered to his original opinion. The following principles exhibit a summarization of the judgment of the court, The Act of Congress of the 26th of February, 1845, extending the jurisdiction of the District Courts of the United States to certain cases upon the lakes, and the navigable waters connecting the same, is consistent with the Constitution. It does not rest upon the power granted to Congress to regulate commerce, but upon the ground that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction as known and understood in this country when the Constitution was adopted. This jurisdiction is not limited to tide-waters, but extends to all public navigable lakes and rivers where commerce is carried on between different States, or with a foreign nation.

The opinion of the court presents the arguments in

[1] *Genesee Chief* vs. *Fitzhugh*, 12 Howard, 443.

favor of this jurisdiction so strongly that the task of the commentator is rendered easy, becoming that of the transcriber of particular passages contained in it as illustrating the force of its conclusions, rather than of the advocate and defender of its correctness. Take, for instance, the following paragraphs:

"If the meaning of these terms was now for the first time brought before this court for consideration, there could, we think, be no hesitation in saying that the lakes and their connecting waters were embraced in them. These lakes are in truth inland seas. Different States border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different States and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them and prizes been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes. There is an equal necessity for the instance and for the prize power of the admiralty court to administer international law, and if the one cannot be established neither can the other.

"Again, the Union is formed upon the basis of equal rights among all the States. Courts of admiralty have been found necessary in all commercial countries, not only for the safety and convenience of commerce, and the speedy decision of controversies, where delay would often be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which the Union was formed, to confine these rights to the States bordering on the Atlantic, and to the tide-water rivers connected with it, and to deny them to the citizens who border on the lakes, and the great navigable streams which flow through the Western States. Certainly such was not the intention of the framers of the Constitution; and if such be the construction finally given to it by this court, it must necessarily produce great public inconvenience,

and at the same time fail to accomplish one of the great objects of the framers of the Constitution: that is, a perfect equality in the rights and the privileges of the citizens of the different States; not only in the laws of the general government, but in the mode of administering them. That equality does not exist if the commerce on the lakes and on the navigable waters of the West are denied the benefits of the same courts and the same jurisdiction for its protection which the Constitution secures to the States bordering on the Atlantic.

"The only objection made to this jurisdiction is that there is no tide in the lakes or the waters connecting them; and it is said that the admiralty and maritime jurisdiction, as known and understood in England and this country at the time the Constitution was adopted, was confined to the ebb and flow of the tide.

"Now there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor any thing in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different States or nations, the reason for the jurisdiction is precisely the same."

In the sentences thus abstracted from the opinion, the reasoning upon which the doctrine is supported is set forth so clearly, so convincingly, may I not say in a manner so incapable of being confuted, that I feel I am best fulfilling the duty that has been assigned to me, by letting the great JUDGE whose relations to the exposition of the Constitution we have been considering, be heard in his own language, in the consideration of a question so momentous. As already said, the view thus presented has received the suffrages of all impartial inquirers into the true meaning of the fundamental instrument upon which our government rests.

Three cases found in the thirteenth volume of Howard's Reports, present, in the opinions of the CHIEF-JUSTICE, views of public law, so correct and so tersely expressed, of the rights of parties who have suffered injury

to their property in the conflict of contending military forces, that they cannot be omitted, and yet want of space forbids more than a brief reference to them.[1] The opinions contain admirable presentations of the law upon the subjects embraced in them, laid down in a calm and temperate spirit, and, as we believe, asserting the soundest views of the law of nations on somewhat difficult points.

We turn to a case which may be termed a controversy between two of the States of the Union, which, from its general importance, justifies consideration, and in which we find the CHIEF-JUSTICE dissenting from the judgment of the court.[2] The points which arose and were decided in it will be stated. The opinion, delivered by Justice MCLEAN, somewhat at length, sustained the following propositions:

The State of Pennsylvania has sufficient interest from its position and the lines of improvement in its borders to sustain an application to the Supreme Court for the exercise of its original jurisdiction by way of injunction, in regard to an alleged obstruction over the Ohio River, the remedy at law being incomplete.

An indictment by the United States against the bridge for a nuisance could not be sustained.

If the bridge obstructed the navigation of the river, its authorization by the laws of Virginia would be no justification. The compact between Virginia and Kentucky, as to the use and navigation of the Ohio, is obligatory, and can be carried out by the Supreme Court.

Chief-Justice TANEY dissented on the following ground, in which Justice DANIEL generally concurred:

Assuming that the bridge does obstruct a public, navigable river, such as the Ohio, which at common law would be a nuisance, is this court authorized to declare it such,

[1] *United States* vs. *Ferreira*, 13 Howard, 40; *Mitchell* vs. *Harmony*, *id.*, 115; *Jecker* vs. *Montgomery*, *id.*, 498.

[2] *Pennsylvania* vs. *Wheeling Bridge Company*, 13 Howard, 518.

and to abate it? Congress may prohibit obstructions in or upon the river, and to declare what are obstructions; but it has not done so. The only common law applicable would be that of Virginia; but she has passed a statute on this very subject. It is not an indictable offense against the law of the United States, there being no statute upon the subject. The law of Virginia sanctioning the bridge is not contrary to the Constitution.

It seems, however, that there is an insufferable objection to the removal of the bridge by injunction, even if it be a nuisance, public or private. The evidence is conflicting and the injury doubtful; nor is it immediate or irreparable. The bridge was built without any previous injunction to restrain the respondents from proceeding in the work. Finally, it is by no means clear that the bridge is a public nuisance at common law; and the jurisdiction is new and unprecedented.

While the objections urged in the dissent of the CHIEF-JUSTICE are ingenious, and ably presented, yet an opinion pronounced by Justice MCLEAN, and concurred in by judges so eminent as CATRON, MCKINLEY, NELSON, GRIER, and CURTIS, is entitled to the very highest respect.

Two cases, in which public law was administered, are to be found in the next volume of reports, in one of which the CHIEF-JUSTICE gave the opinion of the court—in the latter case he dissented. The first case arose out of the separation of Texas from Mexico.[1] The CHIEF-JUSTICE opinion seems eminently wise and correct, in holding that as it belongs exclusively to the political part of the government to recognize a new power in a foreign country claiming to have displaced the old one, and to have established a new one, no citizen of the United States could lawfully furnish supplies to Texas to enable it to carry on war against Mexico, while our government acknowledged its treaty of limits and of amity with Mexico as still subsisting.

[1] *Kennett* vs. *Chambers*, 14 Howard, 38.

In re Thomas Kaine,[1] it was held that under the tenth article of the Treaty of 1842 with Great Britain, a person might be arrested under a warrant issued by a commissioner at the instance of the British Consul, charged with the offence of committing an assault with attempt to murder, in Ireland; and a petition for a writ of *habeas corpus*, addressed to the justices of the Supreme Court, was dismissed and the writ denied. From that ruling the CHIEF-JUSTICE and Justices DANIEL and NELSON dissented, Justice NELSON giving a most able, elaborate, and, in my judgment, convincing opinion against refusing the writ of *habeas corpus*.

The great case of *O'Reilly* vs. *Morse*[2] deserves a passing notice, from its importance to the whole world. The CHIEF-JUSTICE delivered the opinion of the court in favor of Mr. Morse, both as to priority of invention and the substantial identity of the interfering process of O'Reilly, affirming the judgment of the court below, *without costs*, each party to pay his own. Justices WAYNE, NELSON, and GRIER dissented from the judgment on the question of costs, thinking the judgment should be *affirmed with costs*.

The case of *Ohio Life Insurance Company* vs. *Debolt*,[3] presented another phase of a supposed violation of the constitutional provision prohibiting the passage of any law impairing the obligation of contracts, a majority of the court holding that it is not to be presumed that a State legislature has given up its right to tax corporations unless the language used in chartering such corporations is clear and unambiguous. The CHIEF-JUSTICE, in an excellent opinion, discussed the general polity of our State governments, acting, as they all do, through representatives, the powers of the legislatures under this system, the rules by which their action should be construed, and the duty of the court in applying these rules. It was conceded that no legislature could by its action

[1] 14 Howard, 103. [2] 15 Howard, 62. [3] 16 Howard, 416.

disarm their successors of any of the rights of sovereignty confided by the people to the legislature, unless expressly authorized to do so by the constitution under which they were elected; and it was also admitted that the Federal Supreme Court always followed the decision of the State courts in the construction of their own constitution and laws; but with the necessary qualification, asserted with great emphasis, that where these decisions are in conflict the Supreme Court must of necessity determine between them. And it was also shown that the rule of interpretation by which the construction of a State court of a statute of its own State was to be regarded as conclusive, must be limited to ordinary acts of legislation, and does not extend to contracts of the State, although they should be made in the form of a law. For it would be impossible for the Supreme Court to exercise any appellate power in a case of this kind, unless it was at liberty to interpret for itself the instrument relied upon as the contract between the parties, Following these rules the learned judge proceeded to an examination of the statutes in question; and relying upon the rules of construction in cases of this kind well presented by the court, that the grant of privileges to a corporation is to be strictly construed against the corporation and in favor of the public, that nothing passes but what is granted in clear and explicit terms, and that neither the right of the nation nor any other power of sovereignty which the community has an interest in preserving undiminished will be held to be surrendered, unless the intention is plainly manifested, he reached the conclusion that no such exemption from taxation as was claimed by the company had been granted to it by way of contract by the State of Ohio

The opinion of the Chief-Justice in this case deserves consideration, not only for the intrinsic importance and gravity of the principles involved in it, but also for the clear statement of the rules by which the claim set up by the company, is to be settled, and the review of the decisions of the court upon the subject exhibited in it.

He who endeavors to deal with the subject attempted to be handled by the present writer, will find himself oppressed with the wealth of material supplied in the latter volumes of Howard's Reports. And unless he resolutely confines himself to the task of rigid exclusion of every thing which does not come within a strict definition of the subject-matter of this address, and even then exercise a very stringent right of selection of what he may deem the most likely to interest when presented in this manner, will find himself swamped by the largeness of the matter which is laid before him. I omit, therefore, of necessity much that is interesting, and proceed at once to the consideration of a case which it is no figure of speech to say convulsed the whole country from one end to the other, and is still spoken of and discussed with heat, and frequently with a degree of ignorance as to the real points ruled in it, equal to the warmth of feeling exhibited. I refer to the *Dred Scott* case,[1] decided at the December Term, of the year 1856. The following propositions were asserted in the opinion of the CHIEF-JUSTICE, and some or all of them, and the most important as to the *status* of Scott, in the opinions of the judges who formed the majority of the court:

1. A free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a citizen within the meaning of the Constitution.

2. The judgment of the Circuit Court was therefore erroneous, as it had no jurisdiction of the controversy between the parties.

3. SCOTT remained a slave. The law making the Territory of Wisconsin free territory is unconstitutional and void.

4. The Missouri Compromise Act of March, 1820, is unconstitutional and void.

This is a synopsis of the propositions laid down in this celebrated opinion, in which great ingenuity and knowledge of the political history of this country are shown.

[1] *Dred Scott* vs. *Sanford*, 19 Howard, 393.

But it seems to me that the CHIEF-JUSTICE, in an anxious endeavor to carry out the views so often expressed by him as to the right of the individual States to deal exclusively with the subject of this domestic relation, has been carried beyond the proper limitations within which it should have been confined. The reason for this will now be given.

A. The plea in abatement simply raised the question whether a free person of African descent, whose ancestors were slaves, was a citizen entitled to sue. It raised no question of the servile, or *slave status* of the plaintiff. If, therefore, free negroes whose ancestors were slaves had acquired citizenship, the plea was bad, and the judgment on the demurrer should have been sustained. Now it was shown by CURTIS, J., in his opinion, that in several States—notably in North Carolina—at the time of the adoption of the Constitution free negroes were citizens, etc. Therefore the plea was bad.

B. The legislation by Congress—including the celebrated Act of 6th March, 1820—was justified by the Constitution. The article in question which the CHIEF-JUSTICE said applied only to the territory ceded by Virginia and some other States (Northwest territory) had no such restricted meaning. This is clear: 1. By the history of the times. 2. By the inherent force of the words of the article (article IV., section 3, paragraph 2). 3. By all fair and reasonable rules of construction, including contemporaneous construction.

C. Lastly, the courts of Missouri had no right to disregard the law, and to reverse their original decisions, nor was the Federal Supreme Court bound to follow the last decision of the highest court of this State under the circumstances presented.

While Chief-Justice TANEY has always in the public estimation borne the brunt of this decision, it is nevertheless to be considered that of the NINE judges of the court SIX concurred with him in holding that the plaintiff

was a slave, and that the judgment of the court should be affirmed. Of these six (Catron, Daniel, Wayne, Campbell, Nelson, and Grier), TWO—not the two least strong—were respectively from the States of *New York* and *Pennsylvania*, and had both held important judicial positions in those States before reaching the bench of the Federal Supreme Court. They must all share—*and doubtless had none of them any desire to avoid it*—the responsibility of this judgment of the court. The opinion in dissent of Justice CURTIS, an abstract of which is given below, is profound in its examination of the sources of the law upon the subject; luminous and learned in its consideration of the political and judicial history of the country; and convincing in the conclusions to which it arrives. Hardly too much can be said in praise of this masterly effort.

WAYNE, J., concurred absolutely with Taney, C.-J.

NELSON, J., doubting whether the accuracy of the judgment upon the *demurrer* to the plea in abatement was not admitted by the defendant pleading in bar, concurred in the judgment that the Circuit Court had no jurisdiction of the case, for the reason that the plaintiff was a slave.

GRIER, J., concurred in opinion with NELSON, J., and also that Act of 6th March, 1820, was unconstitutional and void as stated by the CHIEF-JUSTICE.

DANIEL, J., concurred generally with the CHIEF-JUSTICE.

CAMPBELL, J., concurred in the judgment pronounced by the CHIEF-JUSTICE.

CATRON, J., thought the judgment upon the plea in abatement not open to examination in this court, and, in an interesting opinion, concurred generally with the CHIEF-JUSTICE on the other points of the judgments of the court.

MCLEAN, J., dissented *cum irâ*. He thought the judgment given by the Circuit Court upon the plea in abatement a finality. He was also against the opinion of the court on every question. A free negro was a citizen. The Constitution (article IV., section 3, par. 2), justified

Congress in prohibiting slavery, &c.; the Act of 6th March, 1820, was constitutional, and the judgment of the Supreme Court of Missouri, pronouncing Scott to be a slave, was illegal, and no authority in the Federal Court.

CURTIS, J., also dissented, and gave his reasons for so doing.

I. He began his opinion by showing that the plea in abatement raised with sufficient distinctness the citizenship of the plaintiff; that the Supreme Court could and should review the judgment of the Circuit Court upon this plea. He then showed that the judgment of the Circuit Court upon the *demurrer* to the plea was valid. His fundamental proposition was that at the adoption of the Constitution all persons who were immediately previous thereto citizens of any State were necessarily citizens of the United States, and as a rule citizens under the Constitution. That free negroes were citizens, voting as such, notably in *North Carolina*, he proceeds to show. It follows that one of FOUR things must be true:

1. Either the Constitution has described what native-born persons shall be citizens of the United States;

2. Or it has empowered Congress to do so;

3. Or all free persons born within the States are citizens of the United States.

4. Or it is left to each State to determine what free persons, born within its limits, shall be citizens of such State, and *thereby* citizens of the United States.

The first three categories are denied; the fourth then is true, and the conclusions reached are:

1. The native-born citizens of each State are citizens of the United States.

2. Free colored persons born within some of the States, being citizens of those States, are also citizens of the United States.

3. Every such citizen residing in any State has the right to sue in Federal Courts as a citizen of the State in which he resides.

4. Therefore the plea in abatement, showing no facts inconsistent with plaintiff's citizenship, etc., is bad.

II. Justice CURTIS dissented also from that part of the opinion of the court which assumed its authority to examine, constitutionally, the Act of Congress of 6th March, 1820.

1. The question was not legitimately before the court after its decision upon the plea in abatement, and to examine it transcended the limits of its authority as repeatedly settled by its own decisions. But as the judge thought the Circuit Court had jurisdiction, he felt bound to consider and review its judgment on the merits.

2. What then was the law of the territory into which the plaintiff was taken by his master? If it was favorable to the plaintiff:

3. Could the courts of Missouri refuse to recognize and allow the effect of that law upon the *status* of the plaintiff after his return within its jurisdiction, and, should it refuse, what was the legal effect of this refusal?

A. The Acts of Congress prohibiting slavery in the territory of Wisconsin were constitutional and valid.

(*a*) The clause in the Constitution, article IV., section 3, par. 2, applied to all territory then or thereafter to be ceded to or acquired by the United States.

(*b*) The language is general and adequate for the purpose, and therefore, *ex vi terminorum*, includes the territory acquired in 1803 by the treaty with France.

(*c*) When the Constitution was adopted, acquisitions of territory in addition to that already ceded were expected to be, and were afterwards actually, ceded.

(*d*) It had been doubted whether foreign territory could be acquired by treaty, but it was solemnly decided that it could be. Some provision for its government was therefore essential, and it:

1. Must be either under the constitutional provision in question;

2. Or by the inherent right of Congress to govern such

territory. Either source of power would be sufficient for the purpose.

(*e*) It is said negro slavery was excepted:

1. By reason of the treaty with France; this is fully answered.

2. By reason of the rights of slave-holding States. This is answered.

(*f*) Contemporaneous construction, by:

1. Acts of congress—legislation.

2. Judicial decisions.

The opposite views were then answered.

The admissions of a majority of the court are in substantial accord with the views already presented.

B. Slavery is the creature of municipal law. Is it *conceivable* that the Constitution (as asserted) has conferred on every citizen the right to become resident in any territory with his slaves? The assumption is inadmissible. An examination of the effect of the treaty with France is then made, and it is shown that there is no such stipulation. But if there were, it becomes a political question, and this court could not pronounce an Act of Congress void because France thought it violated the treaty with it. The Supreme Court of Missouri in its last decision had no right to disregard its previous decisions—it erred in doing so. The authority of their ruling has no weight, and is, of course, not binding upon this court, but should be disregarded. For these reasons, therefore, the judgment of the Circuit Court should be reversed.

In the cases now about to be mentioned[1] the court, through its official head, pursuing the line of reasoning already several times noticed, held that where a State legislature had passed a law allowing the State to be sued, and pending proceedings under it the legislature by another law required certain things to be done, under

[1] *Beers* vs. *Arkansas*, *Platenius* vs. *Same*, *Bank of Washington* vs. *Same*, 20 Howard, 527–532.

penalty of dismissing the suit, this is not an impairment of the obligation of a contract. Chief Justice TANEY gives a short, clear opinion, showing why the law attacked is not obnoxious to the charge made against it.

Taylor vs. *Carryl* presents a nice point of supposed conflict of jurisdiction between the State and Federal authorities, which divided the court very closely. A majority of the judges held that where a vessel is seized under process *in rem* (foreign attachment) from a State court, and pending a motion in it for an order of sale it is seized under process from a Federal court having jurisdiction for seamen's wages, the authority of the State court over the vessel is not divested. Of two sales made in such case, one by the Sheriff, the other by the Marshal, that made by the Sheriff passes the legal title to the vessel. Admiralty jurisdiction, while exclusive on some subjects is concurrent on others, and in such last cases priority of jurisdiction gives priority of right.

Justice CAMPBELL delivered the opinion of the court, from which the CHIEF-JUSTICE, with Justices WAYNE, GRIER, and CLIFFORD, dissented. In his dissenting opinion the CHIEF-JUSTICE, asserting that the lien of seamen for wages is paramount and cannot be displaced by another lien, and justifying his view by an array of authority—particularly by quotations from Chancellor KENT and Justice STORY,—presented so strong a case against the judgment of the court, as to leave the professional mind in a considerable state of incertitude, notwithstanding the practical convenience of the rule laid down of *prior in tempore, potior in jure.*

I cannot pass over a case which contains the germ of the principle developed with so much ability in some quite recent decisions of the Supreme Court, and deals with—what is often a difficult point to establish—the true line of division between State and Federal control over

[1] 20 Howard, 583.

the same subject. In the case in hand,[1] it was ruled that a city ordinance prescribing certain regulations to be observed by vessels lying in harbor is not in conflict with the laws of the United States regulating commerce, or with the general admiralty jurisdiction of the Federal courts. The CHIEF-JUSTICE handled the subject with his accustomed ability, and stated what appears to be the line of demarcation between the control of Congress over the subject and the right of State municipalities to protect themselves by proper regulations, and showed very clearly the necessity of the ordinance in question. A dissent was made by Judges NELSON, GRIER, and CLIFFORD.

A case was now presented which grew out of the Fugitive Slave Law of September 18, 1850.[2] With the heat of the decision in the Dred Scott case still glowing, the Supreme Court of Wisconsin undertook to pronounce this Act of Congress unconstitutional and void, and resisted, so far as it could, its administration by the Federal authorities. The opinion of the CHIEF-JUSTICE, apparently adopted by all the judges, reviews the whole subject at length, and upholding the constitutionality of the Act of Congress, lays down certain principles which should have received the assent of all law-abiding citizens. But the crisis was rapidly approaching. It was held by the court, that the process of a State court, or judge, had no authority beyond the limits of the sovereignty conferring the judicial power. Hence, a *habeas corpus* issued by a State court, or judge, had no authority within the limits of sovereignty assigned by the Constitution of the United States. When such writ of *habeas corpus* is served on a marshal or other person having one in custody under the authority of the United States, it is his duty, by a proper return, to make known the authority under which he holds the person detained; but he is bound to regard and

[1] *Cushing* vs. *Owners of Ship* "*John Fraser*," 21 Howard, 185.
[2] *Ableman* vs. *Booth*, *United States* vs. *Same*, 21 Howard, 506.

execute the process of the United States, and not to obey the process of the State authorities.

No one can well question the soundness of these propositions, but the voice of the law was no longer heard; and in this connection we shall notice another case occurring a little later, when the fires of war were already appearing upon the horizon. I refer to the case of *Commonwealth of Kentucky* vs. *Denison*,[1] in which Chief-Justice TANEY delivered the opinion of the court, announcing the following propositions:

In a suit between two States, the Supreme Court has original jurisdiction, without further Act of Congress regulating the mode in which it shall be exercised. Suit by, or against, the governor of a State in his official capacity, is a suit by or against the State. A writ of *mandamus* does not issue in virtue of any prerogative power, and is nothing more than an ordinary action at law in cases where it is the appropriate remedy. The words "treason, felony, or other crime," in the second clause of the second section of the fourth article of the Constitution, include every offense forbidden and made punishable by the laws of the State where the offense is committed. It is the duty of the executive of Ohio, upon demand of the governor of Kentucky and the production of a certified copy of the indictment, to deliver up an alleged criminal to the governor of Kentucky. This duty is merely ministerial. But no law of Congress can compel a State officer to perform such duty.

There is a tone of almost pathetic dignity in that portion of the opinion in which it is asserted that the performance of the duty in question was left to depend upon the fidelity of the State Executive to the compact entered into by the other States; when it was believed that a sense of justice and of mutual interest would insure the faithful execution of the clauses of the Constitution after it became the fundamental law of the land.

[1] 24 Howard, 66.

In the case of *Almy* vs. *California*,[1] the CHIEF-JUSTICE, delivering the opinion of the court, held that a stamp duty imposed by the State legislature upon bills of lading for precious metals transported from that State to any place outside of it is a tax upon exports, and unconstitutional and void. No one, it is believed, will question the soundness of this decision.

The case of *Rice* vs. *Railroad Company*,[2] is a very interesting one, involving several constitutional questions, and chiefly the provision against the right to pass laws impairing the obligation of a contract. The question of legislative grants both by the States and the Federal Government, was largely considered, including the proper mode of construing State statutes; but as Chief-Justice TANEY simply concurred in the opinion of the court, without giving any opinion of his own, a discussion of the case is not regarded as coming within the scope of the present inquiry.

In *Gordon, ex parte*,[3] it was ruled that a writ of prohibition cannot issue from the Supreme Court where no appellate jurisdiction is given by law, nor any special authority to issue writ. Neither writ of error, writ of prohibition, nor *certiorari* will lie from the Supreme Court to a Circuit Court of the United States in a criminal case. The only mode of bringing the case before the Supreme Court is by a certificate of division. No one has a right to ask for such certificate, nor can it be given, where the judges are agreed and do not think there is sufficient doubt upon the question to justify them in submitting it to the Supreme Court. After conviction and sentence in the Circuit Court for a criminal offense, and the warrant is placed in the hands of the Marshal, commanding him to execute the judgment of the court, the Circuit Court has no power to recall it. Nor can the Supreme Court, having no appellate jurisdiction, prohibit a ministerial

[1] 24 Howard, 169. [2] 1 Black, 358. [3] 1 Black, 503.

officer (the Marshal) from performing the duty legally imposed upon him.

TANEY, C.-J., delivered the opinion of the court.

A passing notice should be given to a case regarding the jurisdiction of the Federal Courts in Admiralty.[1] In this case it was held by the CHIEF-JUSTICE that no State can enlarge, or Act of Congress make, this jurisdiction broader than the constitutional grant confers; it is to be ascertained and determined by the judicial power. A history of the constitutional legislation upon the subject is then given.

In the *Prize Cases*,[2] Chief-Justice TANEY, with three other judges, dissented from the opinion of the court. The case was argued with marked ability upon both sides, the opinion of the court being delivered by Justice GRIER as follows: Neutrals may question the existence of a blockade and challenge the authority of the party undertaking to establish it. One belligerent engaged in actual war has the right to blockade ports of the other, and neutrals are bound to respect this right. The justification of the right of blockade must be found in an actual state of war, and neutrals must have notice of an intention to blockade hostile ports. The parties to civil war are in the same predicament as other belligerents. Nor is a formal declaration of war necessary. What is sufficient notice of blockade is to be determined by the circumstances.

In the dissenting opinion it was asserted that the period of time at which the actual war between the government and the States in insurrection began, *was not before* the Act of Congress of 13th July, 1861. The supposed power of the President to declare war, or to recognize its existence within the meaning of the law of nations, was denied; consequently, all captures for alleged breach of blockade made before the passage of the Act of Congress

[1] *Steamer "St. Lawrence,"* 1 Black, 522. [2] 2 Black, 635.

were illegal and void. While the dissenting judges were, probably, technically correct as to the period when war began, perhaps the more practical rule seems to be the one laid down in the opinion of the court.

Although the CHIEF-JUSTICE lived after the series of Wallace's Reports began, yet ill-health kept him from his place, and he gave no more opinions. The period of his incumbency as CHIEF-JUSTICE may, therefore, be regarded as ending with the second volume of Black's Reports, but many of his opinions whilst sitting in the Circuit Court for the District of Maryland were upon interesting questions of public and constitutional law, and it would be a grave omission not to refer to some of them. They are contained in a volume entitled "Taney's Circuit Court Decisions, Campbell's Reports." The first case of this series contains a very interesting discussion of the law of nations in regard to the immunities of consuls. In pronouncing this opinion the CHIEF-JUSTICE, after reviewing the former decisions, specially noticing some of them as seemingly ruling the point in favor of the exclusive original jurisdiction of the Supreme Court, held that the act of 24th September, 1789, giving jurisdiction to the District Court of the United States in civil cases against consuls and vice-consuls was constitutional.

But the only case which I desire to dwell upon among these decisions is the noted one of *ex parte Merryman*,[1] which involved the right of the President or his delegate to suspend the writ of *habeas corpus*. The facts were these: The petitioner, a citizen of Baltimore County, Maryland, was arrested on the 25th May, 1861, by a military force acting under orders of a major-general of the United States Army commanding in the State of Pennsylvania, and committed to the custody of the general commanding Fort McHenry within the district of Maryland. The day after his arrest a writ of *habeas corpus* was issued

[1] Campbell's Reports, 246.

by the Chief-Justice sitting at Chambers, directed to the commandant at the fort, commanding him to produce the body of the petitioner before the Chief-Justice in Baltimore on the next day. On the last-named day the writ was returned served, and the officer to whom it was directed declined to produce the body for the following reasons: 1. That the petitioner was arrested by order of the major-general commanding in Pennsylvania, upon the charge of treason, in being "publicly associated with and holding a commission as lieutenant in a company having in their possession arms belonging to the United States, and avowing his purpose of armed hostility against the government." 2. That the officer having the petitioner in custody was duly authorized by the President of the United States, in such cases, to suspend the writ of *habeas corpus* for the public safety. The CHIEF-JUSTICE held these reasons to be insufficient, and that the petitioner was entitled to be set at liberty.

In beginning his opinion the CHIEF-JUSTICE, after stating the facts of the case, remarks that he understands that the President not only claims to suspend the writ of *habeas corpus* himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him; also that no official notice had been given to the courts of justice, or to the public, by proclamation or otherwise, that the President claimed this power, and had exercised it in the manner stated in the return. After further stating that the clause of the Constitution which referred to this subject had up to that time received an uniform construction by every jurist and statesman of the day, he proceeded to show that Congress alone had the right to determine when the exigency justified the right to suspend this writ, and to suspend it accordingly.

The clause authorizing the suspension of the privilege of the writ is found in the ninth section of the first article

which is devoted to the legislative department of the government, as the opening section of the article shows. And after the specification in the eighth section of the particular powers of Congress, and its right to make all laws necessary and proper for carrying into execution the powers enumerated, the ninth section begins by words of restriction prohibiting in terms the passage of certain acts by legislation. The collocation of the clause in question is to be noted, for it is found in this ninth section wedged in between two clauses, in the first of which there is a direction against the *prohibition by the Congress* of the importation of certain persons prior to a fixed period of time, and in the second it is asserted that "no *bill of attainder or ex post facto law shall be passed.*" Moreover, the words of qualification annexed to the right to suspend the writ stand as an admonition to the legislative body of the danger of suspending it at all, and of the caution to be exercised in doing so. Furthermore, the powers and duties conferred upon and prescribed to the Executive are enumerated in a separate and distinct article of the Constitution, all of which are distinctly and specifically stated and carefully restricted. It is needless to say that no such power as that claimed is given to the President.

Besides, the fifth amendment to the Constitution provides that no one "shall be deprived of life, liberty, or property without due process of law." So that even if the privilege of the writ of *habeas corpus* were suspended by act of Congress, and a party not subject to the rules and articles of war were afterwards arrested and imprisoned by regular judicial process, he could not be detained in prison or brought to trial before a military tribunal; for the sixth article of the amendments provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, etc."

The CHIEF-JUSTICE then gives, at some length, a history of the long and successful struggle in the mother country for the attainment of the benefit of this writ, speaks of its

inestimable value as a barrier against arbitrary or illegal imprisonment, and then quotes the impressive language of his great predecessor in *ex parte Bollman and Swartwout* in 4 Cranch, 95, the concluding words of which are, that "*until the legislative will be expressed, this court can only see its duty and must obey the laws.*"

This admirable expression of the law upon a subject involving the right of a freeman of protection against arbitrary arrest and punishment is a fitting conclusion to the long and distinguished judicial life of the Chief-Justice. His official voice was not to be heard again upon the judgment-seat, and the days of his age, which had much exceeded even the fourscore years allotted by the psalmist to him that is strong, were soon to pass away.

I am the more desirous that this opinion should be exhibited as a correct exposition of the law as it stood at the time of its delivery, because it was criticised unfavorably by a distinguished lawyer of the day who, in the year in which it was delivered, attempted in an elaborate printed argument to show that "the President being the properest and the safest depository of the power, and being the only power which can exercise it under real and effective responsibilities to the people, it is both constitutional and safe to argue that the Constitution has placed it with him."[1]

In this argument of Mr. BINNEY'S, the CHIEF-JUSTICE'S opinion in *Merryman's* case is not only said not to be a judicial authority, "but not even an argument in the full sense"; and is remarked upon as having (in the apprehensiveness of the writer of the pamphlet) a tone, not to say a ring, of disaffection to the President, and to a certain side of his House.[2] Mr. Binney, besides, professing in the introduction of his pamphlet to present the "constitutional and natural" mode of treating the matter as

[1] Mr. Horace Binney's Pamphlet on the Privilege of the Writ of *Habeas Corpus* under the Constitution.

[2] Mr. Binney's Pamphlet (second edition), page 36.

opposed to the merely "legal and artificial," makes an attempt to show—unquestionably with much ingenuity—from the words of the Constitution, and from his conception of its spirit, that its framers really meant something entirely different from what they said, and that the opinions of every jurist who had referred to the subject, including Chief-Justice MARSHALL himself, were not entitled to weigh in the scale against the assumption made on behalf of the President, because there was nothing on any of the occasions in which they spoke to raise the distinction between Congress and the President. It seems somewhat singular, in a contention as to a claim set up for the first time some seventy years after the adoption of the Constitution, to put aside as entirely valueless the opinions of judges, statemen, and commentators, all speaking in one way with remarkable unanimity as to the sources of the power to authorize the suspension of the writ whenever the subject was presented in any of its aspects, and when the very point is presented judicially, and decided against the right thus claimed for the first time, to assert that the opinion thus given is not an authority. It certainly was the judgment of a competent court having jurisdiction of the subject-matter, and as such an authority for the proper execution of the judgment pronounced. That its mandate was not obeyed by reason of an overwhelming superior force does not lessen its value as an authoritative ruling of the question brought up for decision; nor was there, as seems to have been supposed, any want of fulness in the opinion, either in the discussion of the question from the language of the clause, or from its history, or from the principles of the Constitution which should affect its judicial value. It was a judgment dealing with the very point raised for decision, and as such not only an authoritative ruling of this very point, but also a precedent entitled to all the weight which the importance of the question and its decision by an eminent judicial officer could give to any judgment

made under analogous conditions. Nor need we stop here. We may go further, and say it has neither been judiciously overruled, nor when the question has come up in other cases has it been spoken of disrespectfully or doubtingly.

In the case of *ex parte Milligan*,[1] decided in 1866, in the arguments of counsel and in the opinions of the judges, much was said as to where the power to suspend the writ of *habeas corpus* lodged, yet the judge (Justice DAVIS) who delivered the opinion of the court said nothing in contravention of what had been ruled by Chief-Justice TANEY in *Merryman's* case; and only the faintest show of approval, or to speak more precisely, of omission of disapproval of the course which Chief-Justice TANEY had been called upon to pronounce illegal, is manifested in this opinion; and many passages in it speak with much force of the advantages of the privilege of this great writ to the citizen at all times, and of the importance of strict adherence to the principles of the Constitution, equally in war and in peace.

From the review of the decisions and opinions of Chief-Justice TANEY which has been given, we feel authorized to speak of his relation to the Constitution of the country as follows: First of all, his opinions are characterized by close adherence to the language of the instrument called upon to be expounded, no powers being construed by him to exist in it, which are not found in its words, or resulting therefrom by necessary implication. Extension of the meaning of the words of grant, upon the ground of convenience or desirableness, is strictly repressed; and while full force is always given to what is written in the instrument, under the well known rules of construction, nothing is left to the assistance of inference or implication, unless it becomes impossible to give effect to the operative language made use of without such aid. Among

[1] 4 Wallace, 2.

many illustrations of this important judicial characteristic, we may refer to the ruling in the well-known case of the Charles River Bridge Company, decided shortly after his advent to the Supreme Court.

Again, anxious desire to protect the several States in the full and unfettered exercise of the powers retained by them is everywhere conspicuous in this judge's official career. The history of the times in which the framework of the common government was reared, the mutual concessions made by the parties to it, the fixed resolves as to what should not be surrendered from the custody of the States themselves, had convinced him that where the language made use of was plain and easily understood, no room was left for conjectural reasoning as to what might have been the implied intention, no matter how ingeniously the argument of convenience was urged. The union was one of States which had ceded large and important faculties of sovereignty for the purposes expressed in the creation of the new government, but that which was not surrendered by the States was retained by them in all its original force and fulness. The thirteen States which came together under the Constitution were widely separated by soil, climate, size, and, to a large extent, by difference of industries; and the peculiar relation of slavery existing in nearly half of them, was of itself a source of jealousy and apprehensiveness, which necessitated much concession and forbearance by all the parties to the compact. Those who look for the original of our government in the institutions of the country from which we have to a very great extent taken many, perhaps the most valuable features of our polity, are often misled in applying the analogies derived from that system to the exposition of our own. While it is true that great landmarks have been, from time to time, laid down in what is called the British Constitution, which it is supposed no legislation can transcend, still these so-called fundamental principles are not barriers which cannot be overpassed but

merely beacon lights to guide and warn in times of danger and distress. With us, however, it is far different. Lying at the base of the whole fabric of government are, or are supposed to be, certain fixed, immutable political principles, which cannot be attacked openly or covertly, without incurring the risk of disturbing the super-incumbent mass reared upon them; and artificial as this system may appear to be, and repressive of the action of a great and advancing nation as it may seem to the speculatist upon theories of government, still, this system in the apprehension of Judge TANEY was a political reality, and was to be dealt with accordingly. It might have been wiser, it may be admitted, had some of its provisions had no place in the system, but when seen they must be acknowledged and given effect to by the judge called upon to expound them; they must not be treated lightly by him, or with want of due regard, either to their intrinsic weight, or to their appropriate place in the whole structure. To do this, would have been to disregard the solemn injunction laid upon those whose duty it is, when officially called upon, to explain and give expression, to them. This it is, which enables us to find unity of expression, symmetry of purpose, and consistency of judicial action in the course of the judge whose conduct we have been considering. In the vast majority of the judgments pronounced in nearly all of the opinions given by him, whether as the organ of the court of which he was the head, or as the occasional dissenter from the judgment of the majority of its members, we may trace to the presence of the guiding rules of construction which have been attempted to be here presented, the judicial utterances which proceeded from this Chief-Justice's lips.

Finally, rigid as was Chief-Justice TANEY'S adhesion to the language of the Constitution in giving effect to the supposed powers of the General Government, where the words of the instrument were express and the meaning plain, yet where room was found for a broader interpreta-

tion in conformity with the needs and equality of right of all the States, no hesitation was felt in overpassing the narrow limits within which a formal construction would have confined the jurisdiction of the Federal courts. Where a technical reading of the article would have cramped the courts in the exercise of a most important power, and have operated with partial discrimination against a large section of our common country, a paramount duty was felt and expressed of construing the words of grant of judicial authority by reference to the conditions of the geographical features, and the equal rights of the dwellers in a vast portion of the American territory. This judicial breadth of view is illustrated in the admirable opinion by which the extension of the admiralty and maritime jurisdiction of the Federal courts is made to the entire chain of the great lakes and the waters connected with them.

It is not, perhaps, too much to say at this time, separated as we are by a quarter of a century from the date of his death, that in making an impartial review of his long judicial career, we shall find but a single opinion delivered by him which has been looked upon with permanent hostility of criticism. I refer, of course, to the DRED SCOTT case. In subjecting his opinion in this case of the closest scrutiny, we must keep steadily in view his high ideal of the character of American citizenship, and that doubtless influenced to a considerable extent by early associations and education, as well as by examination of what he regarded as the sources of authoritative decision, he reached the conclusion that the attributes of this character were incapable of residing in any descendant of the race whose claims were before the court in the person of the plaintiff in the suit. And he was merely following in the path so often trod by him before, in attributing to the individual States the exclusive right to determine judicially the *status* of freedom, or of slavery, of a person found domiciled in them. The case itself, and the rela-

tion to it of the several members of the Supreme Court, have been already so fully spoken of that no further statement in these respects is now necessary.

In conclusion, I venture to propose to you as the result of this inquiry into the relation borne by Chief-Justice TANEY to the Constitution of the United States, that during his presidency of the Federal Supreme Court, he showed himself to be the able, faithful, and, with very small exceptions, the correct expositor of that instrument; and that a large debt of gratitude is due to him alike by the members of the profession of the law, the students of constitutional history, and the lovers of free representative government throughout the world, for the tenor of his course while sitting as Chief-Justice of the United States.

LECTURE IV.

CONSTITUTIONAL DEVELOPMENT IN THE UNITED STATES, AS INFLUENCED BY DECISIONS OF THE SUPREME COURT SINCE 1864.

By Charles A. Kent, A.M.

CONSTITUTIONAL DEVELOPMENT IN THE UNITED STATES, AS INFLUENCED BY DECISIONS OF THE SUPREME COURT SINCE 1864.

THE above is the subject upon which I have been invited to speak.

The occasion will not allow a complete treatment of the subject. I shall confine myself to questions, which have arisen out of the civil war, including the constitutional amendments, which were one of its chief results.

Some preliminary remarks, as to the way in which constitutional questions arise in the courts, the effect of their decisions, and the causes which determine them may be useful.

No Federal Court has power to decide a constitutional question, unless it arises in a suit. The power is a result of the duty to determine the law between litigants. The Constitution of the United States is the supreme law. It is also the ultimate basis, on which the validity of all acts of the national government must rest. All acts of federal officials, which the Constitution does not authorize, are legally void. State constitutions and State laws do not depend for their validity on this source. But, if in conflict with it, they also are void. When any litigant bases his claim on any statute, State or national, or any act of any government officer, the question arises, whether such statute or act is in conflict with the supreme law. If in the opinion of the court it is, such claim is void. The ultimate determination of all such questions rests with the Supreme Court, and all other courts are obliged to follow their decisions. But before constitutional ques-

tions can reach the courts, statutes must be passed and enforced. In doing this, the legislative and executive departments must judge, each as to the extent of its powers. There is no method in which the opinion of the Supreme Court as to the validity of proposed acts can be obtained in advance. Congress must make laws, and the President carry on the government, relying on their own views of the constitutionality of their acts. Statutes are thus passed, and enforced, which are believed valid, and enter into all the business of the country. Contracts depending on such validity may involve hundreds of millions of dollars. The legal-tender act is an illustration. In times of war or rebellion, the President may be compelled to decide questions which vitally affect the whole future of the country. Multitudes of lives, and expense beyond calculation, may depend on his decision. What momentous results rested on President Lincoln when Fort Sumter was attacked! The validity of a statute or an act of the Executive may be unquestioned for years. If then a suit arises, in which the claims of one party are based on such act, its constitutionality must be decided by the courts. The power of the courts to declare void acts of the other departments, which may have vitally affected the whole history of the country, is one of exceeding delicacy, and should be exercised only in very plain cases. Nowhere is the American respect for law more emphatically shown than in the obedience rendered to decisions of the courts, State as well as national, setting aside as unconstitutional statutes of the greatest importance, which have been thought valid by the executive and legislative departments.

The Constitution does not in express terms make the decision of the Supreme Court on its construction conclusive on the other departments. Such construction may be disregarded. And it has been earnestly contended that each department of government has an equal right to an independent determination of its constitu-

tional power. But Congress has no general power to enforce its views. Each house is the final judge of the election and qualifications of its members, and the exercise of this power has once in our history determined a most grave constitutional question. As a rule, Congress can but make laws and leave their enforcement to the Executive and the courts. The President may order his subordinates to act on his views of constitutional law in opposition to those of the courts, but he can hardly protect them from the consequences of assailing the rights of individuals in obedience to such orders.

As Commander-in-Chief of the Army, he may refuse obedience to judicial process. This was done by President Lincoln when, claiming that he had the power to suspend the privileges of the writ of *habeas corpus*, he directed General Cadwalader to refuse to produce the body of Merryman at the command of Chief-Justice Taney. But such a course would be very impolitic, unless the emergency was great and the act likely to be justified by public opinion. Perhaps no emergency in time of peace would be sufficient. The courts have a body of subordinates, whose duty it is to enforce their decrees, and resistance is usually both illegal and hopeless. It is of great consequence that the Constitution be interpreted alike by all departments of government. The construction by the Supreme Court is most likely to be correct, since made by eminent judges, after full argument. Public opinion has therefore established the rule, that such construction should be followed by Congress and the President. And ordinarily the decisions of the Supreme Court, on the most vital constitutional questions, are accepted as final. But such decisions do not always establish forever the rule laid down. A question may be re-argued, before the same or succeeding judges, and the rule changed. This was done after the first decision upon the validity of the legal-tender act. And when public opinion demands, a rule established by the courts may be

changed by constitutional amendment. The early decision, making States liable to suits by individuals, was thus set aside. And there may be decisions so contrary to public opinion, that they will not be regarded as settling the law. The famous Dred Scott case is an instance. The court there went out of its way to hold unconstitutional a compromise, which had kept the country at peace for thirty years, and undertook to settle a political controversy, as fierce as any that ever divided parties, and this on grounds which appeared strong only to the party favored. In doing this it antagonized moral sentiments against slavery, which controlled the public opinion of the civilized world. Courts are too weak for such undertakings. The result was what should have been expected. The sentiments, sought to be suppressed, were excited to tenfold activity.

The best judges are far from being infallible. And when they go outside of the necessities of a case before them, and seek to determine the gravest political and party questions, they should expect to find their opinions treated with contempt by all opponents. The utmost which can be claimed is, that the decisions in such cases should be respected until changed, and that only constitutional means should be used to effect a change.

The doctrine of our law as to precedents, the rule that a decision once made should be followed, and reversed only for the strongest reasons, has a great influence in the development of constitutional as well as other law. This rule is based on the great importance of making the law certain, and on that weakness of human reason, by which different minds, acting independently, though of equal ability and integrity, are so liable to come to diverse conclusions on many questions. Whatever certainty the law affords on some subjects, depends more on this doctrine of the binding character of precedents, than on the reasons, given by the courts for the first decisions. Some rules of constitutional law, perfectly settled, might be changed,

if they could be argued now as new questions. Their chief strength lies in the confusion which their overthrow would produce. Still, as has been said, precedents may be overthrown. The courts yield to public opinion, though perhaps less readily than other departments of government. It may be, that in the last analysis, judges are like other public men, but organs of the controlling opinion of their time.

Constitutional provisions are not like the axioms of mathematics, from which conclusions may be drawn in which all intelligent minds must agree. They must be expressed in words, which are incapable of exact definition, which may have many meanings, which may not convey the same shade of thought to different individuals. Constitutions must be short. They should contain only general rules. No man is sufficiently able to draft such rules, so that their meaning shall always be clear. As in religious and philosophical creeds, so in questions of government, human reason and human language are inadequate to find terms, incapable of more than one construction.

The correct interpretation of constitutional provisions is usually and properly sought in the history of the times in which they were made, and in the objects intended to be accomplished. But there may be no certain record of some of these objects. It is probable that members of the Constitutional Convention of 1787 did not understand alike all of its provisions. Individuals may have voted for the same clause for different and even conflicting reasons.

The Constitution was a compromise between sharply conflicting views. It is possible, that some things were purposely left uncertain, because no agreement could be reached on words, which would have removed the obscurity. Soon after the Constitution was adopted, there arose two parties, with conflicting views as to its construction. The tendencies which created these parties can be traced in

our history, in the Constitutional Convention, and long prior thereto. They are at work even to-day in our public life, though with much abated force. One party looks on government as a necessary evil, whose powers should be abridged as much as possible, and whose conduct should be watched with jealousy. It thinks the officials of all governments, inclined to hostility to popular rights, and to a liberal construction of their own powers. This tendency may be in part an inheritance from the times of English tyranny. There was too, in the early days of our nation, a special and extraordinary jealousy of the Federal power. Hence the doctrine, that the Constitution should be strictly construed, that no power should be held to exist unless conveyed in unmistakable terms.

The opposing party is impressed with the belief, that the government of a great nation must have ample powers, that the want of power in emergencies is more dangerous than its liability to abuse. Hence there is a tendency to construe the Constitution as conferring all the ordinary powers of a nation, and especially such as seem necessary for its preservation.

Argument does little to harmonize the views of men with such opposing tendencies. In particular instances it may be shown, that the narrow or the liberal construction of the Constitution is the better, but the general views of which I speak are founded on prejudices too deep to be overcome by argument alone. Chief-Justice Marshall and the Supreme Court, in the period when the principles of constitutional interpretation were forming, inclined to a liberal construction of national powers, and this is a fact of immense importance in the history of the court and the country. Our political parties have been largely based on these opposing views, but the opinions, or at least the practice, of the party controlling the government, always tend to enlarged views of their powers, and the party in opposition has been generally disposed to charge the administration with unconstitutional acts.

The makers of constitutions designed to unite great states and to last for centuries can foresee and provide for but a small portion of the difficulties which may come. When emergencies unforeseen arise, the officers of government may look in vain to the source of their powers to see what should be done. But the government must be administered. The state must be preserved. Though a nation may have been formed by a written constitution, yet time will knit it together by a thousand ties stronger than those of any compact. And no people worthy of the name will allow itself to be destroyed, because of constitutional restraints. The thing which seems necessary for self-preservation will be done, and such justification found, as circumstances permit. Constitutional provisions will be strained, if necessary, and meanings discovered which would never have been thought of in quiet times. And the judiciary will feel the pressure of necessity, as really as the executive or legislative departments.

No doubt, our theory is, that constitutions are made for all times alike, that no emergency can justify the exercise of powers not granted. But the fact is, that the judicial interpretation of governmental powers will depend much on the circumstances under which such interpretation is made. In times of national peril, judges are not likely to engage in conflict with the political powers, upon issues vital to the public safety. In seeking the causes of judicial decisions, we must ever keep in mind the history of the times in which they were made.

No one can study the decisions of the Supreme Court without feeling that many of them have arisen from the characters and prejudices of the judges, who happened to be on the bench, and would have been different at other periods in the history of the court. Not a few important cases have been decided, by a divided court, with a majority of one in favor of the prevailing opinion. Judges are often appointed because of their eminence in political life. They are always selected from the party in power.

They do not lose their political prejudices by their transfer to the bench. The general character of a judge, his ability, his special idiosyncrasies, his personal jealousies even, may affect his decision of the gravest constitutional question. Something perhaps in the most important cases, less than is generally thought, depends on the ability with which a case is argued by counsel.

The causes which determine opinion on the bench are sometimes, like those which control a man's politics or religion, too obscure to be traced. In the courts, as elsewhere, men of equal ability, learning, and integrity come, each with an undoubting conviction that he is right, to the most conflicting results.

The period included in my subject covers the entire terms of Chief-Justices Chase and Waite. The former was appointed in December, 1864, and died in 1873. The term of the latter extended from 1874 to 1888. The importance of this period in constitutional history is second to none. The long controversy of argument, moral, political, and legal, as to the rights of slaveholders under the Constitution, had come to an end. Eleven slaveholding States had put in practice the doctrine long taught by some of their public men, that each State may dissolve the Union for any cause which seems to itself sufficient. A fierce civil war had resulted, and was in progress when Chase took his seat on the bench. The Supreme Court passed on the right of secession, and on the means which could be used for its overthrow. When the rebellion was crushed, questions arose as to the legal status of the seceding States during the war, and as to the validity of the laws enacted by each State and by the Confederate Government. The exigencies of war led the United States Government to arrest many persons in the loyal States on charges of disloyalty, to hold them in prison without trial, or to try them before military commissions, unknown before. The validity of such commissions was judicially determined. The government issued its notes,

not redeemable in coin, and made them legal tender. It established national banks, and, by excessive taxation, compelled all State banks to withdraw their bills from circulation. The constitutionality of these laws was after much litigation affirmed.

After the suppression of the rebellion there arose a bitter controversy between President Johnson and the republican majority in Congress as to the right of the seceding States to immediate representation in that body.

Provisions of the Federal law designed to protect the blacks in the exercise of the right of suffrage were the occasion of several important decisions. Questions arose as to the validity of the constitutional amendments, primarily designed to take away the color line from the laws of the country. Litigation over the meaning of certain clauses of these amendments has continued to the present day, and the end thereof is far distant.

Before proceeding to a discussion of these questions, some account of the members of the court during the period under consideration seems important.

The Dred Scott case was decided in 1857.[1] The opinion of the court was given by Chief-Justice Taney. He held that the Missouri Compromise, prohibiting slavery in the territories acquired from France north of thirty-six, thirty, was void, and that Congress had no power to make such a prohibition. He also held, that a descendant of an African held in slavery in this country could not be a citizen of the United States. Five of the other judges, Wayne, Catron, Daniel, Grier, and Campbell, concurred in this opinion. Nelson concurred in the judgment of the court, on the ground that Scott, who brought the suit, was by the laws of Missouri a slave, and hence could not sue in the Federal Court. McLean and Curtis dissented, and the opinion of the latter presented the northern view of the subject with great ability. Soon after Curtis resigned, and was succeeded by Clifford, who was appointed

[1] Dred Scott *v.* Sandford, 19 Howard, 393.

by Buchanan. Daniel died in 1860, and McLean in 1861. Campbell resigned in 1861, and went with the rebels. Swayne, Miller, and Davis were appointed in 1862, Field in 1863, and Chase in 1864, all by President Lincoln. Prior to the appointment of Chase, who took the place made vacant by the death of Taney, the majority of the court were probably in sympathy with the Southern view of slavery, though not with the right of secession. Catron died in 1865, and Wayne in 1867, and were succeeded after some delay by Strong and Bradley. From the time of Lincoln to that of Cleveland, all the appointments have been made by republican presidents, and the appointees have been classed as belonging to that party, save Field, who has long been considered a democrat. He and Clifford were for years the only democratic members of the court, and their frequent dissents have suggested the presence in the court of much political bias.

Chief-Justice Chase was a member of the court but a little over eight years, and during a portion of this time was unable to perform his duties on account of sickness. He was first a democrat, but at an early period joined the free-soilers, and thence came to the republican party, at its organization. Thenceforward he was one of its most eminent leaders. He was governor of Ohio, United States Senator, and, under Lincoln, Secretary of the Treasury. He administered this last office, under the enormous pressure for money caused by the war, with great ability and success. He was largely instrumental in the passage of the legal-tender act, though he came to its support with great reluctance, and afterwards as judge held it unconstitutional. He was a man of fine presence, a good speaker, upright, able, and very ambitious. As Chief-Justice, he seems to have presided with urbanity and general acceptance. It is probable that his devotion to political life made him a less learned lawyer than he would otherwise have been. His opinions do not indicate

familiarity with all branches of the law. Most of them are on questions of practice, of prize, of confiscation, and of constitutional law. As a judicial writer his style is clear and unusually agreeable. Some of his opinions are able. On the whole, I think his reputation depends more on his political than his judicial life. It would be unwise panegyric to say that his influence on the court was comparable to that of Marshall, or even Taney. Had he lived longer and preserved good health, his judicial reputation might have been much greater.

Chief-Justice Waite was appointed January 21, 1874, and died early in 1888. His reputation rests wholly on his work as a lawyer and a judge. He never held a political office. He never appears to have sought any office. When appointed Chief-Justice, his fitness for the place was not publicly known, and perhaps even his friends were doubtful as to the result. He was more fortunate than Chase in his health and the duration of his life on the bench. He may not have been in all respects as able a man, but he was a more learned lawyer, and, in my opinion, a better judge. His moral character was without reproach. His mind was eminently judicial. His style is clear and pointed. His opinions on some important questions will continue to be read, as lucid expositions of the law. He was an admirable presiding officer, unruffled, prompt, courteous, kind to every one.

Time would fail to speak in detail of the associate justices. Several of those now living are probably the equals of Chase or Waite in legal learning, and in influence on the court. During the period under consideration the court has been an able one, perhaps as able as at any time in its history, though no individual has had the commanding influence of Chief-Justice Marshall.

The position is such as to make an able judge out of any lawyer of good judicial capacity, who has had a fair legal training, and continues on the bench a considerable period. Not a few members of the court have made

respectable judges, though they were not eminent at the bar. No other tribunal in the world has brought before it so many important legal questions, and they are usually argued by lawyers of great skill, the leaders of the bar in the United States. The court can take its own time for decision. The appointments are for life. The salaries, though not large, are sufficient for support. A judge can give his entire time and all his strength to the duties of the place. A man who, with such opportunities for education, does not make an able judge, must be poorly endowed by nature with legal ability. The highest judicial capacity is of course rare, but the lawyers are numerous who can fill respectably seats in our highest judicial tribunal.

Positions on the supreme bench should be given only to those who have previously demonstrated extraordinary fitness, but the respectability and permanency of the place make it sought by politicians, and men cannot now become eminent in politics and law at the same time. The political influence of the court may be so great that each party will always seek to have a majority from its ranks. And more and more, even the highest judicial positions are given to those who seek them most earnestly. But men of great ability will seldom seek place with the energy of inferior persons. Under these circumstances great judges are likely to be developed, if at all, from the education the members of the court receive in the performance of their duties.

The States, which seceded in 1861, justified their course by the claim that the national Union was formed by a compact between independent States, each of whom could rightly judge for itself, whether the compact had been violated, and secede for such violation.

This view finds its chief support in the opinions of some of those who united in making or ratifying the Constitution. The celebrated Kentucky and Virginia

resolutions of 1798 contain perhaps its most conspicuous expression. It has little basis in the language of the Constitution. It is assumed that the Union was made by the States, rather than by the people, and the right of secession is thought to be a logical inference from this fact. It is claimed to be justified from the inherent nature of a compact between independent states. It is said that in a compact between equals, where no arbiter is named, each party must of necessity judge whether the agreement has been violated. But why may not a compact between independent states result in the formation of one state, whose parts can never again be legally separated, just as a contract of marriage results in the indissoluble status of marriage. Whether the Constitution produced such a union is to be determined by its language. To us at the North it seems very plain that the intention was to form a nation without limit as to duration, a nation which, like other nations, could determine all quarrels between its members.

But if the Constitution were but a league, it was certainly a league intended to continue forever, unless broken for good cause, and no one State could be the sole judge of the sufficiency of the cause. And if a State undertook to secede, for a cause not thought sufficient by other States, they certainly must have the right to coerce the seceder by war. If the league doctrine had been universally admitted, still, peaceable secession would have been very improbable.

But on the Northern view, that the Constitution established a perpetual national government, and made the Supreme Court and the people of the whole country the final legal judges of the extent of national power, still there remains the right of revolution, to any State or other locality complaining of injury not capable of redress in any other way, and such locality must judge for itself whether or not the end justifies revolution, subject of course to all the penalties of an unsuccessful attempt.

The practical difference between the two views was mainly this: Some Southerners, who disbelieved in the wisdom of secession, found in the doctrine, that their primary allegiance was due to their respective States, and in the legal right of a State to secede, an excuse for joining in rebellion more satisfactory than any justification founded on the right of revolution. But it is doubtful if the course of any considerable number were changed by this view. Even General Lee joined the Confederate army before his State had seceded. And Breckenridge and many other Southern sympathizers, whose States never seceded, did the same thing.

The rebellion did not, as Alexander Stephens contends, grow out of the constitutional views of its leaders.[1] Doubtless they were honest in their opinions. They did not originate the claim, that a State may secede for any cause it thinks sufficient, but they adopted that view because it suited their designs. The real cause of the rebellion was the fact, that the national government could no longer be controlled in the interests of slavery. Circumstances had made the Southern leaders believe, that their peculiar institution was essential to the prosperity of the South, and that the institution was not safe except protected and fostered by the Federal Government. The desire to protect slavery and justify rebellion, as a means to this end, was the real cause of the constitutional views of the Southern leaders.

And the opposing doctrines maintained at the North did not come from a greater study of the Constitution there than at the South. We, who believed in the indestructible union of the States, adopted this opinion largely because it favored our interests. We had, too, an intense national pride in the greatness of the country, and secession threatened to destroy this greatness, and split the nation into small communities, in danger of perpetual war with each other. We disliked slavery, but felt that the

[1] The War between the States, Vol. I., p. 29.

ultimate defeat of the Southern policy was sure. All the nations of Europe were contributing to increase the preponderance of the North.

The South fought for its peculiar institution, believing, no doubt, that its course was legally justifiable. Accustomed to rule, its leaders despised the people of the free States. The North fought for one undivided country, a grand empire, in which each citizen found his greatest pride. It believed, too, that it was maintaining the Constitution, and that the seceders were rebels against lawful government. Hatred of slavery added vigor to the national arms, but that this was not the main motive in crushing secession is evident from the concessions on this subject the leaders of the republican party were willing to make when it seemed possible to thus avert war.

Much question was made during the last months of Buchanan's administration, of the right of the government to coerce a seceding State. The President and Attorney-General Black, though denying the right of secession, denied also the right of the government to make war on a seceding State, and thought that nothing could be done except to repel all assaults on the officers and property of the United States. Even President Lincoln stated in his inaugural, that he should hold the property and places belonging to the United States, and collect the duties and imposts, but beyond what was necessary for this purpose, there would be no invasion.

The attack on Fort Sumter made an end of such views. Constitutional doubts vanished from government and people. Energetic measures for the prosecution of the war were begun. One of the first was the blockade of the Southern ports, under the authority of the President alone. The validity of the blockade, and of the war thus begun, was first brought before the Supreme Court, during Taney's term, in 1863, in the Prize cases.[1] The majority of the court held, that it was for the President to decide,

[1] 2 Black, 635.

whether, as a matter of fact, a state of war existed, and that the court was bound to follow his decision, and that the right of the President to establish the blockade followed from the existence of a state of war. The minority, among whom was the Chief-Justice, held that only Congress could declare war, and hence that the blockade was not properly established. No doubt was suggested by any member of the court, as to the power of Congress to make war on the seceding States, though the subject was brought to their attention by the arguments of counsel. This, and subsequent decisions,[1] made when Chase was Chief-Justice and later, establish beyond controversy, that secession was illegal, that the Federal Government had the legal right to suppress it by war, with the use of every means of warfare permissible against a foreign belligerent. It had the right to treat all residents of the seceded States as public enemies without reference to their personal loyalty, and to confiscate their property. It had the right to establish martial law in every portion of the rebel territory occupied by the national troops. And the existence of belligerent rights on the part of the United States did not deprive them of sovereign rights. The Federal Union is in its nature indestructible. The seceding States were never legally out of the Union. During the whole war they remained subject to the obligations of the Federal Constitution. All acts of their legislatures, Confederate and State, in conflict therewith were legally void. So were all acts in aid of the rebellion, and all attempts to confiscate the property of loyal citizens.[2] Statutes of the individual seceding States, about matters having no connection with the rebellion, were sustained. Even contracts to be discharged in Confederate notes were held good. And it was allowed to be shown, that promises to pay dollars meant Confederate

[1] Mrs. Alexander's Cotton, 2 Wall, 404; *The Grapeshot*, 9 Wall, 129; Miller *v.* U. S., 11 Wall, 268; Tyler *v.* Defrees, 11 Wall, 332; White *v.* Hart, 13 Wall, 646; Texas *v.* White, 7 Wall, 700; Conrad *v.* Waples, 96 U. S., 279.

[2] Williams *v.* Bruffy, 96 U. S., 176.

dollars. And judgments were rendered in the Federal courts, on all such contracts, based on the value of Confederate notes at the time the contract was made.[1] Contracts to pay for slaves, made while slavery was lawful, were sustained, after slavery had been abolished,[2] and individuals, acting under the direction of the Confederate military authorities, were held not personally liable for the destruction of the property of fellow rebels.[3]

The end of the war found the governments of the seceded States much demoralized. Their chief officers had been prominent in the rebellion. Fearful of their lives, they abandoned their positions. Some method had to be devised of giving these States the protection of law, and providing for their final restoration to their old relations to the Union. The question had occupied much of Mr. Lincoln's attention during the last years of the war, and there had developed a difference of opinion between him and Congress as to whether the Executive or the legislature should provide for reconstruction. If he had lived, this difference would probably have been harmonized. The war closed in April, 1865, and Congress had adjourned, not to assemble until December. Lincoln's tragic death made Johnson President, a man who, perhaps, with the best intentions, lacked Lincoln's personal influence, knowledge of men, and power to manage parties.

After some hesitation as to his course, Johnson adopted the view that restoration of the seceded States should take place as speedily as possible, and with no guaranty from those likely to control the restored States save an oath of loyalty, and that the Executive was authorized alone to take the necessary steps. Accordingly, he appointed provisional governors, and directed them to call constitutional conventions, whose duty it should be to make constitutions under which State governments could be established, and representatives to Congress

[1] Thorington *v.* Smith, 8 Wall, 1.

[2] Osborn *v.* Nicholson, 13 Wall, 654. [3] Ford *v.* Surget, 97 U. S., 594.

elected. No one could vote at the elections for members of these conventions except such as were qualified by the laws of a State just prior to secession, and no other qualification was required save an oath of loyalty. This scheme was carried out. Naturally the leaders of these conventions and of the legislatures subsequently elected were men who had but just laid down their arms against the government. Representatives to Congress were elected from the same class, who presented themselves for admission at the session beginning in December, 1865. Meantime, the action of the new State governments had been such as to awaken great opposition in Congress. Though they had ratified the Thirteenth Amendment, abolishing slavery, laws had been passed which treated the negroes with great cruelty, and practically deprived them of the liberty guaranteed by the amendment. Encouraged by the attitude of President Johnson, the Southern sentiment of hostility to the Union revived. Their leaders openly justified secession. Men who had been loyal to the United States Government were treated with hatred and contempt. Alexander Stephens, who had been Vice-President of the Confederacy, had been elected Senator, and insisted on his constitutional right to a seat, though still advocating the right of secession. These facts excited great indignation at the North and in Congress. The admission of the Southern representatives was refused. Then began a bitter controversy between the President and Congress. The latter insisted upon such conditions in the restoration of the States in question as would protect the negroes. The republican majority was so large, that they were able to maintain their policy over the veto of the President.

In 1866 the Fourteenth Amendment was proposed by Congress, and its ratification made a condition of the readmission of the Southern States. The ratification was refused by these States, save Tennessee, and, in consequence, Congress in 1867 passed a series of laws, known

as the Reconstruction Acts. By them military government was established in these States, and provision was made for the establishment of civil governments, and their restoration to the Union, only by giving the right of suffrage to the negroes, as well as ratifying the Fourteenth Amendment. These conditions were finally complied with, and all the States in this way restored to their normal relations with the Federal Government. The constitutionality of the reconstruction acts was vehemently assailed in Congress and out. The only special provision relied upon in their defence was that by which "the United States shall guarantee to every State in this Union a republican form of government." It is evident, however, that if negro suffrage is now essential to a republican form of government, the meaning of the words must have been much changed since the Constitution was adopted.

A better justification of the course of Congress is found in the argument, that as they had a right to suppress the rebellion, they must have had the right to make such suppression effectual by prescribing such terms of restoration as seemed necessary. The reconstruction acts have been referred to by the Supreme Court, in two or three opinions.[1] Their constitutionality has not been fully decided. But the language of the court shows that it was the duty of Congress, on the suppression of the rebellion, to provide for the establishment of loyal governments in the seceding States, and their restoration to their old place on such conditions as seemed to that body wise, and that the method and conditions of such restoration were political questions in which the court was bound to follow the action of Congress. The right of the President to establish provisional governments in the seceded States, prior to any action of Congress, is sustained, but his power to determine the conditions of restoration, in opposition to the will of the Legislature, is impliedly denied.

During the war Congress, driven by financial necessi-

[1] Texas *v.* White, 7 Wall, 700; White *v.* Hart, 13 Wall, 646.

ties, but with great reluctance on the part of many, authorized the issue of large amounts of United States notes, not then redeemable in coin, and made them a legal tender for all private debts. The history of the decisions on the constitutionality of this act is a striking illustration of how much judicial opinion depends on the men who happen to occupy the bench at a given period. It was first held, only one judge dissenting, that a promise to pay coin made in 1851 could not be discharged by a payment in legal-tender notes, though it was conceded that the legal effect of any promise to pay money made at that time was to pay coin.[1] It was next held that a contract to convey real estate, made before the passage of the legal-tender act, would not be enforced, except on payment of the amount due in coin.[2] Then the court decided that the legal-tender act, so far as it applied to debts contracted before its passage, was void.[3]

This decision was concurred in by four judges, all democrats, save Chase, who was originally a democrat. Three republican judges dissented. Soon after the membership of the court was increased by the appointment of two republicans to fill vacancies, and the question was reargued at great length.[4] The three who before dissented, and the new appointments making a majority, held the act constitutional as to contracts made before its passage, as well as to those made after. The question was argued again and for the last time in 1884, and before a full bench.[5] It was held, only Field dissenting, that Congress has power, in time of peace as well as war, to make United States notes a legal tender for all private debts.

These changes in the decisions did not result from any change in the convictions of any judge, but from the difference in the membership of the court. Here were judg-

[1] Bronson *v.* Rodes, 7 Wall, 229.
[2] Willard *v.* Taylore, 8 Wall, 557.
[3] Hepburn *v.* Griswold, 8 Wall, 603.
[4] Knox *v.* Lee, 12 Wall, 457.
[5] Juillard *v.* Greenman, 110 U. S., 421

ments affecting vast pecuniary interests, which must probably be traced to the political views of the judges. The controlling argument of those who held the legal-tender act valid, seems to have been this: The right to issue such notes has been regarded as one of the usual powers of government. It is not expressly forbidden by the Constitution. The issue of such notes was of the greatest use, if not an actual necessity, in putting down the rebellion. Like crises may arise again, even in peace. The power, therefore, is one of the means which Congress in its discretion may use in aid of the purposes it is expressly authorized to accomplish.

The judgment of the Supreme Court is of course confined to the power of Congress. It does not, as has sometimes been thought, tend in the least to justify the theory that irredeemable paper money is a wise currency, or that any thing, save a great necessity, can justify its issue.

In 1863 an act was passed authorizing the formation of national banks. The power of the United States Government to establish banks had been twice affirmed by the Supreme Court in early cases. Still Presidents Jackson and Tyler did not consider these decisions as settling the matter, but vetoed acts authorizing such banks on the ground that they were unconstitutional. No question seems ever to have been made of the validity of the act of 1863, though this point has been involved in several cases. In 1865 a tax of ten per cent. was imposed on the notes of State banks, with the purpose and effect of driving out of circulation all currency save that furnished by the government and the national banks, and this act was in 1870 held constitutional, though by a divided court.[1] The question has not again been raised, and from that time all the paper money of the country has been based on the credit of the United States. The practical advantages of a uniform currency equally good everywhere are

[1] Veazie Bk. *v.* Fenno, 8 Wall, 533.

so great, that we are not likely to go back to the days of State banks, with bills varying in value in every locality.

The war led to many infractions of the ordinary rules of law as to personal liberty. Very many persons were arrested by the government summarily on mere suspicion, imprisoned a long time, and then discharged without trial. President Lincoln, on his own responsibility, suspended the privileges of the writ of *habeas corpus*. Subsequently Congress passed an act authorizing such suspension, at the discretion of the President, during the rebellion, and enacting that his order should be a complete defence to any suit for arrest or seizure of property during the same period. It also provided that suits of this kind should be brought within two years. In some States not in rebellion, but containing many persons who sympathized with the South and opposed the efforts of the government to prosecute the war, military commissions were established by order of the President, by whom persons not in the military service were tried and condemned for acts considered treasonable.

A conspicuous instance was the case of Vallandingham, before this time a member of Congress, and afterwards democratic candidate for governor of Ohio.

The power of the President to suspend the privileges of the writ of *habeas corpus* was denied by Chief-Justice Taney in the Merryman case, to which reference has already been made. This opinion gave rise to a great deal of discussion at the time, and opinions for and against it were expressed by eminent lawyers. The question was argued before the Supreme Court in the celebrated Mulligan case,[1] but never decided. In this case the military commissions held in the loyal States when the ordinary courts were open for the trial of persons not in the military service, were held illegal. The majority of the court, consisting of five judges, decided that Congress had no power to establish such courts. The minority, four

[1] *Ex parte* Mulligan, 4 Wall, 118.

judges, held that the commissions were illegal, because, though Congress had the power, it had not undertaken to establish them. The case is an authority only as to the power of the President to establish such commissions, since this was the only point involved. The validity of the statute protecting persons who had acted under the authority of the President has never been decided by the Supreme Court, but they have upheld the short statute of limitations,[1] and I do not know that any one ever seriously suffered for infringements of individual rights committed in obedience to executive authority.

The practical result of the exercise of doubtful powers by the President during the civil war will probably lead to a like course should any similar emergency arise. Public opinion condoned or justified such exercise. The Union was saved. Slavery, which long threatened its perpetuity, was destroyed. The means taken to accomplish these great results were not carefully scrutinized by the prevailing public sentiment. But whatever infractions of the law were committed by the government during the war, such acts have long since ceased. The liberty of the individual citizen, and the security of his property, are to-day as safe from violation by the Federal Government as at any period of our history.

The Constitution provides: "The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof, but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

The custom had long existed of holding elections for representatives to Congress almost exclusively under State regulation. In 1870 and 1871, Congress passed acts, providing for a supervision of such elections. It left the State officers to conduct the elections, under State statutes, but provided penalties for the violation of either State or Federal

[1] Mitchell *v.* Clark, 110 U. S., 633.

laws and for their enforcement in the Federal courts. The constitutionality of these acts was assailed, but they have been sustained in several decisions of the Supreme Court.[1] These cases show that Congress may regulate all elections for representatives in Congress, as fully as it chooses. It may enforce State laws or make full provision by national statutes. It may provide for the most improved means of registering the will of the voters. The provisions already existing, against bribery and against the intimidation of voters, are of the most stringent kind. The same is true of the penalties for making false returns by the inspectors of elections.

The primary object of these statutes was probably to prevent frauds upon the colored voters of the South, but they apply equally to all parts of the country, and they may become as important for the repression of bribery at the North, as of intimidation and ballot-box stuffing at the South. Security for a free ballot is a subject of immense and growing importance. If the government of a numerical majority is to be permanent, that majority must be free and unbought.

Serious question was made at one time as to the validity of the Thirteenth, Fourteenth, and Fifteenth amendments.

The Thirteenth was proposed in Congress and ratified, while none of the seceding States were represented there. And yet the validity of the ratification depended on the approval of States thus unrepresented. The same objections existed to the other two amendments. And, in addition, their ratification was forced on these States. It was made a condition of their readmission to their ordinary rights in the Union.

Had the members of the Supreme Court been opposed to the policy involved in these amendments, the objections named might have made their validity more than questionable. But the political character of that court was such

[1] *Ex parte* Siebold, 100 U. S., 371. *Ex parte* Clarke, 100 U. S., 299. U. S. *v.* Gale, 109 U. S., 65. *Ex parte* Yarborough, 110 U. S., 651.

in 1872, when the construction of these amendments was first brought before it, that no dispute as to their validity was then made, nor has any such question since arisen therein.

The Thirteenth Amendment, which provides for the abolition of slavery, and involuntary servitude, except for crime, has given rise to little litigation.

Though many laws were passed by Southern States after the ratification of this amendment, whose object was to deprive the negroes of much of its benefit, no question under them seems to have reached the Supreme Court. It was contended in the Slaughter House cases, as they are called [1], that the words "involuntary servitude" were broad enough to cover any restriction of the right of an individual to pursue his calling in any proper place, and hence to make void the giving of exclusive privileges, by State legislatures, to control any occupation within prescribed limits, but the court held the contrary, and the majority decided that such privileges were not in conflict with any part of the Federal Constitution. Whatever security our institutions afford against the grant of a monopoly, must be found in State and not United States laws.

The meaning of certain parts of the Fourteenth Amendment has given rise to much controversy. The main purpose of all these three amendments was, as has been decided by the Supreme Court, to make sure the emancipation of the negroes, and provide for their protection, and against State discrimination on account of color. But these amendments do not confer on them the right of suffrage. This still depends on the laws of each State. The Fifteenth Amendment does, however, provide that no State shall deny to any one this right, because of "race, color, or previous condition of servitude." And the 2d clause of the Fourteenth Amendment provides that, if the right of suffrage is denied to any males of full age, save for crime,

[1] 16 Wall, 37.

the number of representatives in Congress shall be proportionably reduced.

It is obvious, therefore, that any State may restrict the right of suffrage by any line save that of "race, color, or previous condition of servitude," subject, however, to a loss of representation in Congress. It is possible, also, that a condition of suffrage, with which a voter may comply, as the learning to read, or the possession of a small amount of property, may not be construed as a denial of the right.

If the legal rights of the negro to vote in the Southern States become fully recognized in practice, and the result is that the State governments, where the blacks have a majority, become unendurable, some restriction of the suffrage, by a change of State or United States constitutions, will become necessary. The government of the majority cannot permanently endure, anywhere, unless that majority, in a fair degree, represents the intelligence of the people.

The first section of the Fourteenth Amendment reads thus:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The object of the first clause is to do away with the effect of the Dred Scott decision, which made it impossible that the descendant of a slave could be a citizen, and made citizenship the prerogative of birth in this country, with an unimportant exception of the children of persons who, though residing in this country, are in some foreign service. It is held that this clause makes a distinction

between citizens of the United States and citizens of a State; that one may be a citizen of the United States, and not a citizen of any State. Residents of territories and of the District of Columbia are of this class.[1]

The clause, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," has given rise to much discussion. Congress seems to have understood it as giving them power to prevent discriminations on account of color, though made by private persons. A Federal statute was passed forbidding such discriminations by inns, common carriers, and theatres. This statute was held void, on the ground that the constitutional prohibition is against State and not against individual action. Discriminations by private persons are held not subject to the power of Congress.[2]

What are the privileges or immunities of citizens of the United States which cannot be abridged? It was held by a minority of the court, four judges, in the Slaughter House cases, that they are such fundamental rights as belong to one as a free man and a free citizen, and that these rights, formerly secured only by the State constitutions, are now protected by that of the United States. But the doctrine of the court is, that the provision means only to secure such rights as are given by other portions of the Federal Constitution; but no definition or complete enumeration of these rights is attempted. The provision does not give Congress power to protect the ordinary rights which arise under State laws.

The clause which forbids any State to deny to any person the equal protection of the laws, forbids any discrimination by any department of the State, executive, legislative, or judicial, between persons on account of their color. Negroes otherwise qualified must have the same right as white men to sit on juries. But it is not

[1] Slaughter House cases, 16 Wall, 36, 72; Presser *v.* Illinois, 116 U. S., 252.

[2] U. S. *v.* Harris, 106 U. S., 629; 109 U. S., 3.

necessary, even in the trial of a negro, that there should be jurors of his race. It is enough that no one is forbidden to be a juror because of his color.[1] This clause protects also the Chinese, and under it ordinances of San Francisco discriminating against them in the maintenance of laundries have been declared void.

The provision that no State shall deprive any person of life, liberty, or property without due process of law, has given rise to a great deal of litigation. It is found in substance in Magna Charta. There its meaning is plain. It was a covenant by certain English kings not to exercise arbitrary power, not to deprive any person of his life, liberty, or property save by virtue of the common law, or some statute of Parliament. It has never been regarded in England as a restraint on legislative power. The history of the phrase has made it dear to the friends of popular government, and hence when the American constitutions were formed it found its way into them, State as well as national. In the latter it was but a restriction on the Federal Government, and gave rise to but little litigation. Having got into our constitutions, the phrase is a restriction on legislative as well as executive power. It cannot mean merely what it did in Magna Charta, protection, except as against the law, for every act of a legislature not forbidden by the Constitution, State or national, is a law. The courts were therefore bound to find for it some additional meaning, and in my opinion they have had but indifferent success in doing this. No court has been able to find a definition giving that certainty, which is the first requisite of all law, and especially of that constitutional law which makes void all supposed law in conflict therewith. The chief difficulty is in the words "due process of law," and especially in the word "due." It means, fit, proper, and with this meaning

[1] Strauder *v.* West Virginia, 100 U. S., 303; Virginia *v.* Rives, 100 U. S., 313; Neal *v.* Delaware, 103 U. S., 370, 398; Bush *v.* Kentucky, 107 U. S., 110.

it seems self-evident that no one should be deprived of life, liberty, or property by process of law unless such process is fit—that is, regular, legal. But the real question is, what kind of process of law is fit, and what is so unfit that it will be void, though provided for by a statute, and upon this point the words under consideration afford no aid. The question is left to the courts, with no rule for their guidance save such as they may originate. They may hold that due process of law is only such as had been customary when the provision was adopted, and so check any improvement in such process; or they may determine what due process ought to be, and make this the rule. In either view the provision is substantially made by the courts and not by the people, and in doing it they verge on the dangerous doctrine, that statutes may be declared void, because in conflict with unwritten principles of constitutional law.

In spite of the uncertainty in the meaning of the phrase in question, perhaps because of its uncertainty, and consequent infinite possibility of meaning, it was put in the Fourteenth Amendment. The consequence has been to give the United States Supreme Court jurisdiction, by writ of error to the State Supreme Courts, of every case in which the defeated party claims that any State has by constitution, statute, or other State action deprived him of life, liberty, or property without due process of law. A large number of cases have on this ground reached our highest tribunal. In 1877, in Davidson *v.* New Orleans,[1] Judge Miller, in delivering the opinion of the court, says, referring to the phrase under discussion: "While it has been a part of the Constitution, as a restraint upon the power of the States, only for a very few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law." And again he says: "It would seem from

[1] 96 U. S., 97.

the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinion of every unsuccessful litigant in a State court of the justice of the decision against him." And Judge Miller thinks that there "must be some strange misconception of the meaning of the provision." In 1885, in Missouri Pacific Railway Co. *v.* Humes,[1] Judge Field, giving the opinion of the court, quotes the above language of Judge Miller, and adds: "This language was used in 1877, and now, after the lapse of eight years, it may be repeated, with an expression of increased surprise at the continued misconception of the purpose of the provision." And yet neither of these eminent judges undertakes to remove this misconception by defining the phrase in question. They admit the impossibility of such definition.

Since 1885 the litigation on this subject has continued undiminished. But if the Supreme Court will not define "due process of law," it has been very careful not to set aside State laws, on the ground that they are in conflict with this provision. Many as are the suits in which its jurisdiction rests on the allegation of such a conflict, in perhaps no case has the judgment of the State court been reversed on this ground. A large number of important decisions show the tendency of the court. In the Slaughter House cases the majority of the court held, after two elaborate arguments and much consideration, that a statute of Louisiana giving a corporation the exclusive right for twenty-five years to maintain slaughter-houses in New Orleans and adjacent district, and providing that all cattle must be slaughtered there, did not conflict with this or any other provision of the Constitution.

The Supreme Court has been asked in several cases to set aside State laws prohibiting the manufacture and sale

[1] 115 U. S., 512.

of intoxicating liquors, on the ground that they took away property without due process of law, but always without success.[1] In 1888 the same result followed a like attempt to have that court hold void a law of Pennsylvania prohibiting the manufacture and sale of oleomargarine.

State statutes fixing the maximum which railroads and elevators for the storage of grain may charge, have been sustained by the Supreme Court, though assailed by eminent counsel, on the ground of a conflict with the provision in question, with the greatest force and confidence.[2] Whatever injustice may exist in such laws, the Federal Constitution affords no relief.

Jury trials in the State courts are not within the protection of this provision of the National Constitution, nor is it necessary that a murderer should be indicted by a grand jury before prosecution under State laws.

In the very celebrated and recent murder cases of Spies *v.* Illinois, the anarchist case,[3] and Brooks *v.* Missouri,[4] where an Englishman murdered his travelling companion, the Supreme Court held that there was no error in the trial courts which it could correct. These and other decisions show that for the protection of all the ordinary rights of life, liberty, and property, each individual must rely mainly on the constitution, statutes, and judiciary of his own State, and that the jurisdiction of the Supreme Court of the United States can be successfully invoked, at present, only in extreme cases. Still, the jurisdiction exists in all this class of cases, and the time may come when that court, with a changed membership and changed tendencies, may set aside State laws deemed most important for the proper administration of justice.

[1] Bartmeyer *v.* Iowa, 18 Wall, 129 ; Beer Co. *v.* Massachusetts, 97 U. S., 25 ; Mugler *v.* Kansas, 123 U. S., 623 ; Powell *v.* Pennsylvania, 127 U. S., 678.

[2] Munn *v.* Illinois, 94 U. S., 113 ; Railroad cases, 94 U. S., 155–187.

[3] 123 U. S., 131.

[4] 124 U. S., 394.

This review enables us to estimate the chief constitutional changes in the National Government during the period under consideration. The permanency of the Union seems assured against all opposing forces now in sight. The right of secession has been overthrown by the strongest of arguments. The greatest of rebellions has been crushed. The National Government has power to vindicate its existence and its control against any State or combination of States. And slavery, the great source of disunion, has perished. All distinction on account of race, color, or previous condition of servitude has passed away from our laws. Unfortunately the black man is still an element in our politics. The powers of the National Government, even in time of peace, have been increased. The recent amendments have not merely destroyed slavery, and given protection to the negro. They have given the United States a vague jurisdiction over State laws, which may some time produce results now unforeseen.

But at this time no permanent evil has resulted from this extension of national power. Personal rights of all kinds still depend mainly on State laws. Nor do I anticipate that the State governments will ever be shorn of their essential powers and a consolidated national government established. The States will remain as indestructible as the Union. But the powers of the National Government may be still further increased. We are bound together by so many commercial ties, the business of our great railroads and of our great manufacturers and merchants reaches through so many States, that it often seems unfortunate that the rules of the law should vary so much with State boundaries. It would be a great improvement if the laws as to negotiable securities and ordinary commerce were one throughout the whole country. The variety of laws as to marriage and divorce in the different States and Territories produces great disturbance in the family relation, perhaps the most im-

portant interest of society. The possibility of the perpetuation of the Mormon doctrine of a plurality of wives through State laws, is not pleasant to contemplate. Public opinion may some time demand a constitutional amendment giving to the United States the regulation of the rules of marriage and divorce. The advantages of uniformity may bring other matters, now left to the States, within the sphere of the National Government. And there may be a pressure from those who believe that morality can best be advanced by prohibitory laws, to extend the United States jurisdiction so that it may put down all pursuits injurious to society. But every extension will bring opposing evils. Congress and the Supreme Court may become burdened with business to which they cannot attend. It would be very inconvenient for the people of most of the States to have to seek in Washington the mass of the legislation their interests require, or to do there the other public business now done at the capital of each State.

And interest in public affairs will be best maintained, and public expenditure watched, when the people of every State feel that their chief burdens are of their own making. What will be the line which shall eventually divide State jurisdiction from National, no one can tell. Perhaps it will be a line often changing. I see here no cause for fear.

That the union of these States will be perpetual, that the States remain indestructible, that National affairs continue the province of the former and local matters that of the latter, is, I believe, the wish of every patriot.

LECTURE V.

THE STATE JUDICIARY: ITS PLACE IN THE AMERICAN CONSTITUTIONAL SYSTEM.

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THE STATE JUDICIARY: ITS PLACE IN THE AMERICAN CONSTITUTIONAL SYSTEM.

THERE are two obvious and natural divisions of the subject which I am set to discuss on the present occasion: *First*, the place intended, by the original frame of our political system, for the State Judiciary; *Second*, the place which it has actually held and now holds in that system.

These topics direct attention to the fact that our political system has an outward form which is express and written; that its theoretic lines are traced by a written constitution, or charter of government, which was intended to fix not only its form, but to guide and prescribe its development in the affairs and exigencies of its relations and adaptations to practical government;—thus affording a direct contrast to the political system of that country from which our descent, institutions, laws, and literature, have been chiefly drawn.

On the other hand, these topics remind us to what a limited extent the great forces which underlie society and government are controlled or shaped in their practical operation and results by written formulæ or texts of government.

We speak, in ordinary phrase, of written and unwritten constitutions and laws, but in a high sense the law or force which really controls and fixes governmental development and progress is always unwritten. It is beyond the wit or power of man completely to trammel up the future. Circumstances and exigencies of life, needs and desires of men or communities, adapt, modify, or override written laws and constitutions. True it is, as one of our great orators has said: "Nature's live growths crowd out and

rive dead matter. Ideas strangle statutes. Pulse-beats wear down granite, whether piled in jails or capitols. The people's hearts are the only title-deeds, after all."[1]

The history of the development of our government and law under the Constitution of 1789 teaches this lesson. Certain large outlines of government were sketched in our Constitution; certain general relations between the States and the United States were established; certain broad powers to be exercised by the several departments of the national government were defined; certain leading limitations upon both the States and the United States were ordained;—such was the written Constitution; and then this Constitution was committed to the keeping and working of a young, hopeful, ardent people, by position and in large degree by training dissociated from the traditions of Europe and committed to influences and principles opposed to those traditions;—such was the unwritten Constitution. No considerate judgment will say less than that the great ideas of the written Constitution were wise with the wisdom of experience and of the spirit which was fitted to inform with power and beneficence the new government. Yet in the light and retrospect of a century, it is plain that our Constitution, as it exists and operates to-day,—its success as well as its actual development,—is due, more than to its framers, to three great facts and forces in our history, outside of the written Constitution: the unequalled practical sagacity, influence, and patriotism of Washington as President; the intellectual, moral, and judicial greatness of Marshall as Chief-Justice; and the profound depth of the influence and effects of the Civil War of 1861 and its causes. Without these forces, it is entirely conceivable that, with the same written Constitution, our national development, political and otherwise, might have been widely and essentially different from what we now see,—a conclusion which warrants one of Mr. Bagehot's profoundest aphorisms: "Success

[1] Wendell Phillips' "Speeches and Lectures," p. 278.

in government in England, as elsewhere, is due far more to the civil instincts and capacity of our race, than to any theoretical harmony or perfection of the rules and formulæ of governmental conduct."

Perfect rigidity of constitution, absolute inflexibility of construction, are as impossible as undesirable. If human language would lend itself to such results, human society would not. But language is incapable of excluding all looseness and uncertainty of meaning. The opposing rules of strict construction and liberal construction are applied or may be applied to any written document. Centripetal and centrifugal forces exist in human society as truly as in physical nature. The radical and conservative tendencies are inherent in different mental constitutions. These facts make it inevitable that men of equal intellectual integrity and power, of equal personal purity and patriotism, will find divergent and hostile meanings in the same instrument. So it has been; so it is; so it will be.

I propose, therefore, to consider my subject under this natural and necessary two-fold aspect: the place of the State Judiciary as indicated by the written Constitution; and its place as determined by our political and judicial history.

The grand general thought and purpose of the Constitution was to create a government adequate to secure certain common national objects, while at the same time preserving and perpetuating the autonomy and independence of the States, so far as compatible with the desired and necessary sovereignty of the Nation. It is misleading to say the purpose was merely to form a *national government*. The purpose was never the creation of a nation, in the sense in which England and France are nations. The object was no other than to form, in the great and memorable phrase of Chief-Justice Chase: "an indestructible Union, composed of indestructible States."

In the celebrated case of *Cohens* v. *Virginia*,[1] decided in 1821, Chief-Justice Marshall has stated, from the point of view of the Union, the purpose of the Constitution, in a manner which leaves nothing to be desired.

"That the United States form," said he, "for many, and for most, important purposes, a single nation, has not yet been denied. In war, we are one people; in making peace, we are one people; in all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government, which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and for many purposes, a nation; and for all these purposes, her government is complete; to all these objects, it is competent. The people have declared that, in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire,—for some purposes, sovereign, for some purposes, subordinate."

Chief-Justice Chase, in the well known case of *Texas* v. *White*,[2] decided in 1868, in an opinion unsurpassed in its breadth both of forensic and historical treatment of this subject, thus presents the purpose of the Constitution, from the point of view both of the States and the Union:

"The perpetuity and indissolubility of the Union," he says, "by no means implies the loss of distinct and individual existence or of the right of self-government by the States. Under the Articles of Confederation, each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were

[1] 6 Wheaton, 264, 413. [2] 7 Wallace, 700, 755.

much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in Union, there could be no such political body as the United States.'[1] Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their Union under the Constitution, but it may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government."

A recent writer upon Constitutional Law, of pre-eminent ability and special acuteness of analysis,—the late Professor Pomeroy,—has put forward the thesis, not only that the States of the Union are not independent or sovereign as members of the Union, but that they never were at any time antecedent to the Union.[2] Defining a nation to be, "in its strict sense, an independent, separate, political society, with its own organization and government, possessing in itself inherent and absolute powers of legislation," he declares that "in respect to all these particulars which truly constitute a nation, each State must be described in terms the exact opposites of those employed in reference to the United States."

One could hardly find a stronger example of the misleading effect of an *a priori* theory upon such a subject. Apply this definition of a nation to one of the States of the Union. Massachusetts, or Michigan, is "a separate political society"; it has "its own organization and government"; it possesses "inherent and absolute

[1] *Lane County* v. *Oregon*, 7 Wall, 76.

[2] "Constitutional Law," §§ 25–120a. Similar views are presented in the more recent work,—Hare's "American Constitutional Law."

powers of legislation." Neither the United States nor any of the other States can efface its separate, political existence, blot out its organization or government, or deprive it of its inherent and absolute powers of legislation. It is indisputable that by far the greater part of the topics of legislation are exclusively within the power of the States. The whole vast range of rights of person and of property is chiefly confided to the care and control of the State governments. And this constitutes sovereignty and independence. The States are limited, in some aspects of ordinary sovereignty, by the terms and restrictions of the Constitution of the United States.

Look, on the other hand, at the sovereignty of the United States. Is it not strictly, absolutely limited, in many aspects and directions? How few of the topics of State legislation are within the scope of the legislative power of the Union! The sovereignty of the States is not more truly limited than is the sovereignty of the United States. The number of topics of legislation which lie outside the pale of national legislation greatly exceeds the number to which the power of State legislation does not extend. Why, then, shall the one be called truly sovereign, and the other wholly subordinate? Each is truly sovereign; each is truly limited in its sovereignty. The States are sovereign, free from, and superior to, any other power, as to all matters not excluded from their power by the Constitution; they are subordinate as to all matters forbidden to them, or committed by the Constitution to the United States. The United States is sovereign as to all matters delegated to it by the Constitution; it is without any sovereignty, jurisdiction, power, or function, as to all matters not placed within its power by the Constitution. Why, then, shall sovereignty be affirmed of the United States and denied of the States? Each is under the limitations imposed by the Constitution, the United States having only the powers conferred by the Constitution, the States having all the powers

not denied to them nor conferred on the United States by the Constitution.

The same writer regards the power of amendment contained in the Constitution as "utterly inconsistent with any assumed sovereignty in the separate Commonwealths.[1]

The argument proves too much for those who use it; for, if through the power of amendment, as is said, "States may be brought under the sanction and obligation of an amendment, without their assent, and even with their decided opposition"; and if "the very idea," as is further said, "of sovereignty excludes any power in another body-politic to limit the functions of a State against its consent," it is obvious that this power of amendment is equally available to restrict or destroy the powers of the United States. It is entirely possible that amendments might be adopted in the manner provided by the Constitution, which would deprive the United States of its most essential powers; deprive it, for example, of the power to levy and collect taxes, or to borrow money, or to raise and support armies; in a word, reduce it below the "imbecility," as the *Federalist* terms it, of the Confederation of 1778. The power of the States, acting in the manner prescribed by the Constitution, to amend the Constitution, is a power not only to "limit," but to "destroy the functions of the United States, against its consent."

Again, it is asserted by the writer referred to,[2] that "it is demonstrable as a fact of history, . . . that the separate States, as individual bodies-politic, were never independent, never clothed with the attributes of nationality." It is asserted that the colonies, before their revolt, "possessed, singly or in combination, none of the powers and attributes of nationality,"—that while "each colony was independent of the others," "each was

[1] Pomeroy, "Constitutional Law," §§ 110, 111.

[2] Pomeroy, "Constitutional Law," § 111.

a dependency and an integral part of the British Empire."

If this be true, as it unquestionably is, then when the colonies ceased to be dependencies of the British Empire, did they not become independent and sovereign? "No," we are told, "because the Declaration of Independence was not the work of thirteen separate colonies, each acting in an assumed sovereign capacity, but of the United Colonies acting in a national capacity through their delegates in Congress assembled." I need hardly point out how expressly this theory is contradicted by the language of the Declaration of Independence: "We, therefore, . . . in the name and by the authority of the good people of these colonies, solemnly publish and declare, that these United Colonies are, and of right ought to be, FREE AND INDEPENDENT STATES"; not a free and independent State, or Nation, or Union, or Confederacy, but free and independent STATES.

And pursuant to this declaration of the individual independence of the colonies, the separate States proceeded, each for itself, each in its own time and way, to form and adopt separate constitutions of government, separate State organizations, separate State governments. It is true that these free and independent States continued to act together under the Articles of Confederation as they had before acted together in what was styled the "Congress of the Delegates Appointed by the Good People of these Colonies"; but under the Articles of Confederation adopted at Philadelphia, July 9, 1778, it was placed in the forefront of the declaration of confederacy, that—"EACH STATE retains its SOVEREIGNTY, freedom, and INDEPENDENCE, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled."

Surely, historical evidence could scarcely be clearer than that which points to the fact—recognized, declared,

undisputed—of the sovereignty and independence of the individual States prior to the adoption of the Constitution.

It is not the less a notable and significant fact, however, that the colonies at first and the States afterwards, throughout the struggle for independence, and down to the adoption of the Constitution of 1789, had acted together, drawn and held in union by the bonds of common hopes and aims and a common danger, a fact which warrants us in saying that our Union was the growth of a century of colonial and State experience and association before 1789, and not the manufacture of the day or hour; or, to quote the weighty and accurate words of Chief-Justice Chase in *Texas* v. *White*:[1]

"The Union of the States never was a purely artificial and arbitrary relation. It began among the colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the Articles of Confederation. By these the Union was solemnly declared to 'be perpetual.' And when these articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect Union.'"

To deny, therefore, a limited sovereignty to a State of the Union, under the Constitution, is, forensically and historically, as incorrect and mischievous as to assert more than a limited sovereignty for the United States under the Constitution. Each is sovereign; but each is sovereign only within the limits traced by the Constitution.

I have dwelt thus upon this point of our Constitutional law, not primarily to combat and disprove an unsound theory, but because my theme has to do directly with the

[1] *Supra*, p. 724.

relations of the States to the Union in one of their most vital aspects. Our American political system is strictly *imperium in imperio*, or rather *imperia in imperio*,—forty-two indestructible States constituting one indestructible Nation; States and Nation, sovereign,—the one, to the extent not forbidden, the other, to the extent prescribed, by the Constitution.

And one of the most important modes by which the power of these separate but connected sovereignties is manifested, is the judicial power which each exerts; and the ground which we have already traversed enables us to affirm, generally, of the State Judiciary, that in the scheme of the Constitution—the plan of our Constitutional system—it was intended that it should hold and exercise all the judicial power belonging to a sovereign State, which is not by the Constitution vested in the United States.

The words which confer the judicial power of the United States, and thereby fix the limitations of the judicial power of the States, are few and simple:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish."

Article III., Section 1.

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under its authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same States claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects."

Section 2.

"In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State is a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress may make."

Section 3.

To this is to be added the Eleventh Amendment:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens of any foreign state."

These provisions cover three topics: *First*, the designation of the depositaries of the judicial power—the courts; *second*, the extent of the judicial power; *third*, the division of the judicial power into original and appellate, and its distribution, in this respect, to the Supreme Court.

The precise effect of these provisions upon the jurisdiction of the State courts does not appear to have been thought out in detail either in the Convention of 1789 or in the discussions of the *Federalist*. The 27th number of the *Federalist* certainly suggests the idea that the State courts might be made by Congress the judicial agencies for enforcing, apparently without other agencies or courts established by the United States, the laws of the United States. Thus it is there said: "The plan reported by the Convention, by extending the authority of the Federal head to the individual citizens of the several States, will enable the Government to *employ the ordinary magistracy of each State in the execution of its laws.*"[1] And again in the 81st number, it is said: "To confer the power of determining such causes (causes arising out of the National Constitution) would perhaps be as much 'to constitute tribunals' as to create new courts with the like power."[2]

[1] *Federalist* (Dawson), p. 179. [2] *Federalist* (Dawson), p. 565.

These suggestions have never been sanctioned in the construction of the grants of judicial power to the United States and its distribution by the Constitution. On the contrary, the view has prevailed that "the Constitution is imperative upon Congress to vest all the judicial power of the United States in the shape of original jurisdiction in the Supreme and inferior courts, created under its own authority." "The judicial power of the United States shall be vested in one Supreme Court, and in such other inferior courts as the Congress may, from time to time, ordain and establish."

In *Martin* v. *Hunter's Lessee*,[1] the Supreme Court, in one of the most valuable expositions of constitutional law ever given by that court, says, through Judge Story: "Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself."

A further conclusion reached in the same case was thus stated: "It is manifest that the judicial power of the United States is unavoidably, in some cases, exclusive of all State authority, and in all others may be made so at the election of Congress"; and the court proceeds to designate as within the exclusive jurisdiction of the United States courts, the criminal jurisdiction of the United States, and its admiralty and maritime jurisdiction, and adds that "it can only be in those cases where, previous to the Constitution, State tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction."

Upon the subject of the concurrent jurisdiction of the State courts in matters to which the judicial power of the United States extends under the Constitution, the *Federalist* had expressed similar views. Discussing the inquiries, whether the jurisdiction of the United States courts is exclusive, or whether the State courts possess a concur-

[1] 1 Wheaton, 304, 330.

rent jurisdiction in matters arising under the Constitution, the 82d number of the *Federalist*, written by Hamilton, says:

"The principles established in a former paper teach us that the States will retain all *pre-existing* authorities which may not be exclusively delegated to the Federal head; and that this exclusive delegation can only exist in one of three cases: where an exclusive authority is in express terms granted to the Union; or where a particular authority is granted to the Union and the exercise of a like authority is prohibited to the States; or where an authority is granted to the Union with which a similar authority in the States would be utterly incompatible. Though these principles may not apply with the same force to the judiciary as to the legislative power, yet I am inclined to think that they are in the main just with respect to the former as well as the latter. And under this impression, I shall lay it down as a rule that the State courts will *retain* the jurisdiction they now have, unless it appear to be taken away in one of the enumerated modes.

"The only thing in the proposed Constitution which wears the appearance of confining the causes of federal cognizance to the federal courts is contained in this passage:—'The judicial power of the United States *shall be vested* in one Supreme Court and in such inferior courts as the Congress shall from time to time ordain and establish.' This might be construed to signify that the Supreme and subordinate courts of the Union should alone have the power of deciding that cause to which their authority is to extend; or simply to denote that the organs of the national judiciary should be one Supreme Court and as many subordinate courts as Congress should think proper to appoint; or, in other words, that the United States should exercise the judicial power with which they are to be invested, through one supreme tribunal, and a certain number of inferior ones, to be instituted by them. The first excludes; the last admits, the concurrent jurisdiction of the State tribunal; and as the first would amount to an alienation of State power by implication, the last appears to me the most rational and the most defensible construction.

"But this doctrine of concurrent jurisdiction is only clearly applicable to those descriptions of causes, of which the State courts have previous cognizance. It is not equally evident in relation to cases which may grow out of, and be *peculiar* to, the Constitution to be established; for not to allow the State courts a right of jurisdiction in such cases, can hardly be considered as the abridgment of a pre-existing authority. I mean not therefore to contend that the United States, in the course of legislation upon the objects intrusted to their direction, may not commit the decision of causes arising upon a particular regulation to the federal courts, solely, if such a measure should be deemed expedient; but I hold that the State courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion that in every case in which they are not expressly excluded by the future acts of the National Legislature, they will, of course, take cognizance of the causes to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts. When in addition to this we consider the State Governments and the National Government, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction, in all cases arising under the laws of the Union, where it was not expressly prohibited."

It is clear, as a result of these discussions and decisions, that in some cases enumerated in and arising under the Constitution, the jurisdiction of the United States courts is in its nature exclusive; in others, it may be made exclusive at the will of Congress; and in others, the State courts have concurrent jurisdiction in the absence of its express denial by Congress; and that in all cases to which

the jurisdiction of the United States is extended by the Constitution, the Congress has power to vest exclusive jurisdiction in its own courts.[1]

The question still remains, whether Congress can vest in the State courts any part of the constitutional grant of judicial power to the United States. It may permit the exercise of some parts of such jurisdiction by the State courts; but this is only to leave to those courts such jurisdiction as the State constitutions or laws confer on them; but in *Houston* v. *Moore*,[2] it was said by Mr. Justice Washington speaking for the court: "I hold it to be perfectly clear that Congress cannot confer jurisdiction upon any courts but such as exist under the Constitution and laws of the United States; although the State courts may exercise jurisdiction in cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the Federal Courts,"—a doctrine laid down, as has been seen, in the earlier case of *Martin* v. *Hunter's Lessee*, in these terms: "Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself."

In view of those judicial decisions and principles, which fix the theoretic relations of the State judiciary to the United States, it may be observed that in all cases of concurrent jurisdiction of State and Federal courts, as well as in cases confided exclusively to either jurisdiction, neither class of courts can properly or lawfully interfere to control or hinder, or to seek to control or hinder, the exercise of the jurisdiction of the other. No State court may enjoin the judgment of a court of the United States,[3] nor annul or destroy rights acquired under such judgment[4]; nor interfere with or control the process of such court. No State court or legislature can prescribe rules or forms of procedure in courts of the United States[5]; nor

[1] Story on Const., § 1754.
[2] 5 Wheaton, 27.
[3] *McKim* v. *Voorhis*, 7 Cranch, 279.
[4] *United States* v. *Peters*, 5 Cranch, 115.
[5] *United States* v. *Wilson*, 8 Wheat., 253.

issue *mandamus* to an officer of the United States or of a United States court to enforce his duties under the laws of the United States[1]; and while the writ of *habeas corpus* may be issued by a State court or judge, yet when the return shows that the party is held under Federal authority, the State court can proceed no further, but must leave the validity of the detention or imprisonment to be determined by the Federal court[2]; and generally it may be affirmed that no State court can either by virtue of its judicial authority, character, or power, or of any authority conferred by any State constitution or legislature, control or direct a court of the United States.

On the other hand, no Federal court is empowered, except in the exercise of appellate jurisdiction, to enjoin the judgment of a State court, or otherwise to arrest, control, or hinder its jurisdiction or proceedings[3]; and whenever the State and Federal courts have concurrent jurisdiction, the court which first has possession of the subject by commencement of suit must adjudicate it.[4]

The point which has now been reached enables us to make this general statement of the place of the State judiciary in the American political system; (1) The judicial power of the several States, under our Constitutional system, extends to all matters and cases whatsoever of judicial cognizance, which are not vested by the Constitution in the United States, or prohibited by it to the States. (2) Of the matters and cases embraced in the grant by the Constitution of judicial power to the United States, the judicial power of the States extends, concurrently with that of the United States, to all matters and cases which do not, by their nature, fall exclusively within the prescribed limits of the judicial power of the United States,

[1] *McClung* v. *Silliman*, 6 Wheat., 598.

[2] *Ableman* v. *Booth*, 21 How., 506.

[3] *Diggs* v. *Wolcott*, 4 Cranch, 178; *Ex Parte Cabrera*, I Wash. Circ. R., 232; *Buck* v. *Colbath*, 3 Wall., 534.

[4] *Smith* v. *McIvor*, 9 Wheat., 532; *Wallace* v. *McConnell*, 13 Pet., 136.

and of which the State judiciary may take jurisdiction agreeably to its own constitution and powers under the State constitution and laws.[1]

In a word, the jurisdiction of the State judiciary covers all matters which may be the subjects of judicial cognizance, except such as are by their nature, or by the express terms of the Constitution or of acts of Congress, placed within the exclusive jurisdiction of the United States, or are excluded from the jurisdiction of the State courts by the State constitutions or laws.

It is to be observed that the whole of the judicial power conferred by the Constitution on the United States was not at once conferred by the statutes of the United States on its courts. By the Judiciary Act of 1789, and from that time until the act of March 3, 1875, the jurisdiction of the United States Circuit Courts was extended in civil suits only to suits at common law and in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and an alien is a party, or the suit is between a citizen of the State where it is brought and a citizen of another State. This jurisdiction was original and was not made expressly concurrent with that of the State courts. By the act of Congress of March 3, 1875, as well as by the similar acts of 1883 and of 1887, this jurisdiction is extended to embrace the entire extent of judicial power as expressed in Section 2 of Article III. of the Constitution, and this jurisdiction is made expressly concurrent with that of the State courts.

By the 12th Section of the Judiciary Act of 1789, the power to remove certain suits from the State to the United States courts was conferred on the defendant in such suits. This power has been gradually enlarged by statutes until it now covers all suits which might have been originally brought in the United States courts, and extends to both plaintiff and defendant. Practically, therefore, any

[1] *Martin* v. *Hunter's Lessee*, *supra*.

party may now have recourse to the United States courts in any case falling within the terms of Section 2 of Article III. of the Constitution.

The great statute, known as the Judiciary Act of 1789, is worthy of more special remark at this point. Its purpose was to develop and put into operation the judicial power confided by the Constitution to the United States. Drawn by Oliver Ellsworth, afterwards Chief Justice, it is a monument of legislative skill and foresight. The framework of a judicial system then developed has continued,—marched, it may be said,—*pari passu* with the Constitution itself; for the few changes which have been made have been along the lines and in the directions drawn and pointed out in this remarkable statute. It has all the authority of a contemporaneous exposition of that part of the Constitution with which it is concerned. Its scope embraces the organization of the Supreme Court and the definition and regulation of its appellate jurisdiction, together with the establishment of inferior courts for the exercise of the original jurisdiction conferred by the Constitution.

One of the most important of the provisions of the Constitution creating and defining the relations and place of the State judiciary in our political system, is the *appellate* jurisdiction conferred by the Constitution on the Supreme Court. The twenty-fifth section of the Judiciary Act prescribes the cases and conditions in which that court may review the proceedings and judgments of State courts. The Constitution provides that in all cases to which the judicial power of the United States extends, except "cases affecting ambassadors, other public ministers and consuls, and those in which a State is a party," the Supreme Court shall have "appellate jurisdiction under such regulations as the Congress shall make."

The practical development and definition of this appellate jurisdiction, and its exercise by the Supreme Court, present the most interesting, delicate, difficult, and proba-

bly the most vital, point in our dual or compound judicial system. The power of revising the decisions of State courts, of courts of separate, and in all respects not excepted by the Constitution, sovereign and independent, States, as well as the power of authoritatively and finally construing the Constitution in all its aspects and relations, are powers more vital, more unique, more controlling, than were ever before confided to any court. The power of revising the judgments and decrees of State courts was made by the Judiciary Act to include all final judgments or decrees of the highest courts of the States in all suits drawing in question the validity of a treaty or statute of the United States, or an authority exercised under the United States, where the decision of the State court is against their validity; or drawing in question the validity of a statute of any State, or an authority exercised under any State on the ground of its conflict with the Constitution, treaties, or laws of the United States, where the decision of the State court is in favor of their validity; or drawing in question the construction of any clause of the Constitution, or of any treaty, or statute, or commission of the United States where the decision is against the title, right, privilege, or exemption claimed. Such power of revision and reversal of judgments and decrees is limited to grounds of error appearing on the face of the record, and concerning only the specified questions of the validity or construction of the Constitution, treaties, laws, statutes, commissions, or authorities in dispute. At the end of a century, without substantial changes, these provisions remain the definition of this tremendous appellate power of the Supreme Court. By this power that court enforces by its judgments and decrees, as against the judgments and decrees of the State courts as well as of the inferior courts of the United States, all the judicial powers of the United States conferred by the Constitution, and all the limitations and prohibitions imposed by the Constitution either on the United States or the separate States.

Vitally and directly as this power affects the exercise of power by the executive and legislative departments, it is still confined by its constitutional limitation to cases and suits at law or in equity. Judicial power in its nature is power to hear and decide causes pending between parties who have the right to sue and be sued in courts of law and equity. The power given to the Supreme Court to construe the Constitution, to enforce its provisions, to preserve its limitations, and guard its prohibitions, is not *political* power, but is judicial power alone, because it is power exercisible by that court only in the discharge of the judicial function of hearing and deciding causes in their nature cognizable by courts of law and equity. Hence, as has been recently remarked by Mr. Justice Matthews[1]:

"Social and political evils that may be supposed to arise from abuses of legislative power, which cannot be reduced to the form of judicial controversies, and are therefore incapable of judicial remedies, can only be met and repaired by a resort to other constitutional methods. . . . If these fail in a given case to furnish a cure for the malady and its mischief, the mischief must be set to the account of that imperfection which still marks and mars the administration of all human affairs."

This control of State courts by the Supreme Court, thus limited and defined, was contemplated by the authors of the Constitution. In the 82d number of the *Federalist*, Hamilton remarks:

"The national and State systems are to be regarded as one whole. The courts of the latter will, of course, be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decision. The evident aim of the plan of the convention is that all causes of the specified classes shall for weighty public reasons receive their original or final

[1] Address at the Yale Law School, 1888.

determination in the courts of the Union. To confine, therefore, the general expressions, which give appellate jurisdiction to the Supreme Court, to appeals from the subordinate federal courts, instead of allowing their extension to the State courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation."[1]

The essential relations of the State courts to the United States courts are, therefore, of concurrent jurisdiction in many matters of original cognizance in the latter courts, and of original general jurisdiction in all matters not committed by the Constitution to the judicial power of the United States, their judgments and decrees being subject in all cases affecting rights claimed or exercised, or arising under the Constitution, to the revising or appellate jurisdiction of the Supreme Court of the United States, but in all other cases controlled only by the constitutions and laws of the respective States.

That such a dual and compound system of judicature, such relations between the judicial organs and depositaries of two largely independent political States or sovereignties, should result in some anomalies, some inconveniences, some conflicts, and even in some abuses, might well be apprehended. With few exceptions, however, the spirit of comity has guided both State and Federal tribunals, and the occasions of conflict or opposition seem to be diminishing rather than increasing in number and degree of importance.

It is obvious that in a mechanism of government, a political system, so arranged, with courts whose jurisdictions are at points exclusive and at points concurrent, there must be a large class of cases of judicial cognizance in which the courts of either jurisdiction are not responsible to those of the other, and as to which there is no common arbiter. The jurisdiction conferred on the United States by the Constitution embraces two classes of cases—

[1] *Federalist* (Dawson), pp. 574, 575.

those of which the jurisdiction arises from the *subject-matter of the cases*, that is, some right, claim, or authority arising under the Constitution or laws of the United States; and those of which the jurisdiction arises from *the character of the parties*, as aliens or as citizens of different States. In the latter class of cases, the United States courts are called upon to administer the local law of the respective States. Cases of this class brought in the United States courts are as completely within the judicial power of the United States as are cases directly involving rights or claims arising or asserted under the Constitution or laws of the United States. At the same time, the State courts have jurisdiction of all cases involving like issues and of like nature, in which the character of the parties does not make them cognizable in the courts of the United States, and over the decisions of all such cases in the State courts, no court of the United States has any degree of judicial control.

We find, therefore, in each State, two courts, or sets of courts, dealing with the same persons, and the same subjects, yet each absolutely uncontrolled by the other, or by a common superior. It must have been in view of this foreseen result that the Judiciary Act of 1789 contained this provision: "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." This provision has been constantly in force during the century which has now passed since its enactment.

The earlier decisions of the Supreme Court go far towards upholding the view that the laws of the States—meaning by that term the statutes of the States as authoritatively construed by the State courts—so far as they are in harmony with the Constitution, are absolutely binding on the United States courts exercising jurisdiction within the respective States.

In the case of *Shelby* v. *Guy*,[1] the rule on this point is thus stated:

"That the statute law of the States must furnish the rule of decision to this court, as far as they comport with the Constitution of the United States, in all cases arising within the respective States, is a position that no one doubts. Nor is it questionable that a fixed and received construction of their respective statute laws in their own courts makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction. It is obvious that this admission may, at times, involve us in seeming inconsistencies, as where States have adopted the same statutes and their courts differ in the construction. Yet that course is necessarily indicated by the duty imposed on us, to administer, as between certain individuals, the laws of the respective States, according to the best lights we possess of what those laws are." p. 367.

The doctrine here announced is unmistakable;—the statutes of the States and their fixed and received construction by the State courts are to govern the courts of the United States in administering the local law within the respective States.

And this doctrine is supported and followed in many other cases.

It will be observed that in the case just cited it is the "*fixed and received*" construction by the State courts which is to be followed. The extent of the limitation thus suggested is obviously an important question. What is meant distinctively by the "fixed and received" construction? May there be a construction of a State statute by a State court which under this rule may not be followed because not a "fixed and received" or "settled" construction? If, for example, the State courts change their decisions and overrule what has been the "fixed and received" construction, are the Federal courts bound to follow the later decisions, even to the extent of overruling their own former decisions? This question was di-

[1] 11 Wheaton, 361.

rectly and strongly presented in the case of *Green* v. *Neal's Lessee*.[1] The case was ejectment in the United States Circuit Court sitting in Tennessee, and involved the construction of the statute of limitations of the State of Tennessee. The Supreme Court in two previous cases—*Patton's Lessee* v. *Easton*[2] and *Powell's Lessee* v. *Harman*[3]—had followed what was supposed to be the construction of this statute by the State courts. But in *Green* v. *Neal's Lessee* it was made to appear to the court that the former decisions of the State courts "were made under such circumstances that they were never considered in the State of Tennessee as fully settling the construction of the act," but that it had been finally settled by a later decision of the highest court of Tennessee. The Supreme Court was therefore confronted with the alternative of overruling two of its own former decisions, or of refusing to follow the settled construction of the act by the State court. The decision is strikingly illustrative of the true relations of the two classes of courts.

The court says:

"The question is now raised whether this court will adhere to its own decision made under the circumstances stated, or yield to that of the judicial tribunals of Tennessee. This point has never before been directly decided by this court on a question of general importance. The cases are numerous where the Court have adopted the constructions given to the statute of a State by its supreme judicial tribunal, but it has never been decided that this Court will overrule their own adjudication establishing an important rule of property where it has been founded on the construction of a statute made in conformity to the decisions of the State at the time, so as to conform to a different construction adopted afterwards by the State.

"This is a question of grave import, and should be approached with great deliberation. It is deeply interesting in every point of view in which it may be considered. As a rule of property

[1] 6 Peters, 291. [2] 1 Wheaton, 476. [3] 2 Peters, 240.

it is important ; and equally so, as it regards the system under which the powers of this tribunal are exercised." p. 294.

The court then proceeds to examine the view heretofore taken by the Supreme Court of the United States of the decisions of the State courts, and concludes as follows:

"This court have uniformly adopted the decisions of the State tribunals, respectively, in the construction of their statutes. This has been done as a matter of principle, in all cases where the decision of a State court has become a rule of property."

Discussing the question generally the court proceeds to say :

"In a great majority of the causes brought before the Federal tribunals, they are called to enforce the laws of the State. The rights of parties are determined under those laws, and it would be a strange perversion of principle if the judicial exposition of those laws, by the State tribunals, should be disregarded. These expositions constitute the law and fix the rule of property. Rights are acquired under this rule, and it regulates all the transactions which come within its scope. . . .

"On all questions arising under the Constitution and laws of the Union, this court may exercise a revising power ; and its decisions are final and obligatory on all other judicial tribunals, State as well as Federal. A State tribunal has a right to examine any such questions and to determine them, but its decision must conform to that of the Supreme Court, or the corrective power may be exercised. But the case is very different where a question arises under a local law. The decision of this question by the highest judicial tribunal of a State should be considered as final by this court, not because the State tribunal in such a case has any power to bind this court, but because in the language of the court in the case of *Shelby* v. *Guy*,—'a fixed and received construction by a State in its own courts, makes a part of the statute law.'

"The same reason which influences this court to adopt the construction given to the local law in the first instance, is not less strong in favor of following it in the second, if the State tribunals should change the construction. A reference is here

made not to a single adjudication but to a series of decisions which shall settle the rule. Are not the injurious effects on the interests of the citizens of a State as great in refusing to adopt the change of construction, as in refusing to adopt the first construction? A refusal in the one case as well as in the other has the effect to establish in the State two rules of property.

"Would not a change in the construction of a law of the United States by this tribunal be obligatory on the State courts? The statute, as last expounded, would be the law of the Union; and why may not the same effect be given to the last exposition of a local law by the State court? The exposition forms a part of the local law and is binding on all the people of the State and its inferior judicial tribunals. It is emphatically the law of the State, which the Federal court while sitting within the State, and this court when a case is brought before them, are called to enforce. If the rule as settled should prove inconvenient or injurious to the public interests, the legislature of the State may modify the law or repeal it.

"If the construction of the highest judicial tribunal of a State form a part of its statute law as much as an enactment by the legislature, how can this court make a distinction between them? There could be no hesitation in so modifying our decisions as to conform to any legislative alteration in a statute, and why should not the same rule apply where the judicial branch of the State government in the exercise of its acknowledged functions, should by construction give a different effect to a statute from what had at first been given to it? The charge of inconsistency might be made with more force and propriety against the Federal tribunals for a disregard of this rule than by conforming to it. They profess to be bound by the local law; and yet they reject the exposition of that law which forms a part of it. It is no answer to this objection that a different exposition was formerly given to the act, which was adopted by the Federal court. The enquiry is,—what is the settled law of the State at the time the decision is made? This constitutes the rule of property within the State by which the rights of litigant parties must be determined.

"As the Federal tribunals profess to be governed by this rule, they can never act inconsistently by enforcing it. If they change their decision, it is because the rule on which that decision was founded has been changed."

And in this case, the Supreme Court, although it had rendered two decisions, based, as has been seen, upon a different construction of the statute of limitations of the State, overruled its former decisions and followed the latest decisions of the State court.

In the case of *United States* v. *Morrison*,[1] which was an appeal from the judgment of the United States court sitting in Virginia, the court below had rendered its decision adversely to the claim of the United States, but soon afterwards, and while the appeal was pending, the Court of Appeals of the State rendered a decision giving such a construction to the statute involved as would have upheld the claim of the United States. Chief-Justice Marshall, in delivering the opinion of the court, says: "This court, according to its uniform course, adopts that construction of the act which is made by the highest court of the State."

And in the case of *Leffingwell* v. *Warren*,[2] the court, on the authority of the cases already referred to, laid down the rule thus:

"If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications."

There is, however, in these decisions, a clear limitation of the rule to cases where the law of the State is "settled." "Reference," says the court in *Green* v. *Neal's Lessee*, "is here made not to a single adjudication, but to a series of decisions which shall settle the rule."

There is also to be assumed or expressed in all cases, the other limitation, that the decision of the State court

[1] 4 Peters, 124. [2] 2 Black, 599.

shall comport with the Constitution of the United States.

In accordance with these qualifications of the rule of absolute obligation, the Supreme Court in many later decisions has declined to follow decisions of State courts construing State statutes and constitutions, on one of the two grounds,—(1) that the decision in question did not "settle" the law, did not represent its "fixed and received" construction, or (2), that the State statute as construed by the State court did not comport with the Constitution of the United States. Thus, in the case of *Groves* v. *Slaughter*,[1] the court construed the Constitution of Mississippi as affecting the validity of a note given for the purchase of slaves imported into that State, there being at that time no decisions of the State courts on the point in question. Subsequently the highest court of the State rendered decisions contrary to the decision in *Groves* v. *Slaughter*, but the Supreme Court, with the dissent of two justices, refused to change its decision to conform with the latest State decisions.

In *Rowan* v. *Runnels*[2] Chief-Justice Taney said:

"Undoubtedly this court will always feel itself bound to respect the decisions of the State courts, and from the time they are made will regard them as conclusive in all cases upon the construction of their own constitution and laws. But we ought not to give them a retroactive effect and allow them to render invalid contracts entered into with citizens of other States, which, in the judgment of this court, were lawfully made. For, if such a rule were adopted, and the comity due to State decisions pushed to this extent, it is evident that the provision in the Constitution of the United States, which secures to the citizens of another State the right to sue in the courts of the United States, might become utterly useless and nugatory." p. 139.

Here the decision is put upon the ground that the construction adopted by the State court was, in effect, in conflict with the Constitution of the United States.

[1] 15 Peters, 449. [2] 5 Howard, 134.

In the case of *Pease* v. *Peck*,[1] a law, as published in the State of Michigan, had long been acknowledged by the people, and had received a harmonious interpretation in the State courts for a series of years, and the legislature of the State had sanctioned the law as published; subsequently the original manuscript act was discovered to differ from the published act, and it is stated that the Supreme Court of Michigan decided that the manuscript act must be held to correct the published act. But the Supreme Court of the United States refused to follow the decision of the State court, and Judge Grier, delivering the opinion of the court, uses language which it is difficult to reconcile with the doctrine of all the other decisions of that court.

"There are," he says, "many *dicta* to be found in our decisions, averring that the courts of the United States are bound to follow the decisions of the State courts on the construction of their own laws. But although this may be a correct, yet a rather strong, expression of a general rule, it cannot be received as the enunciation of a maxim of universal application. Accordingly, our reports furnish many cases of exceptions to it. In all cases where there is a settled construction of the laws of the State by its highest judicature, established by admitted precedent, it is the practice of the courts of the United States to receive and adopt it without criticism or further inquiry. But when this court have first decided a question arising under State laws, we do not feel bound to surrender our convictions on account of a contrary subsequent decision of a State court, as in the case of *Rowan* v. *Runnels*.[2] When the decisions of the State court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions; and much more is this the case where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines subversive of former safe precedent. . . . Nor do we feel bound in any case in which a point is first raised in the courts of the United States, and has been decided in a

[1] 18 Howard, 595. [2] 5 Howard, 139.

circuit court, to reverse that decision contrary to our own convictions, in order to conform to a State decision made in the meantime. Such decisions have not the character of established precedent declarative of the settled law of a State."

These terms are certainly loose and apparently not well considered, for it cannot be said that the doctrine that "the courts of the United States are bound to follow the decisions of the State courts on the construction of their own laws," is in any sense a *dictum*, for, as we have seen, it is the express decision of the court in the determination of many cases which have arisen. Nor does the reference to "the convictions of the court" seem to be appropriate, for under the decisions which we have examined, it is not "the convictions" of the court but the fact of the decisions of the State court, which require the application of the rule in question, under the two limitations or exceptions already stated:—that the decisions of the State court shall be "settled"; and shall be conformable to the Constitution of the United States. And this decision seems really to have been put upon the ground that the latest decision of the State court was not the settled law of the State, and it seems clear that the remarks quoted from the opinion of Mr. Justice Grier, are not to be regarded as a correct statement of the rule in question.

In a large class and series of cases arising mainly from the issue of bonds upon the faith and credit of counties, towns, and municipalities, the court has likewise refused to follow State decisions upon one or the other of the grounds already stated.

In the well known case of *Gelpcke* v. *City of Dubuque*,[1] the Supreme Court of Iowa, by a series of decisions had upheld the power of the State to authorize its cities and counties to subscribe for the stock of railroad companies

[1] 1 Wallace, 175.

and issue bonds in payment. Subsequently the same court held its former decisions erroneous and denied the power then ascribed to the State legislature. The Supreme Court of the United States, against the very vigorous, if not violent, dissent of one of its ablest members, held that the latest decision in question of the State court could not be regarded as the *settled* law of the State, as well as that the latest decision would have the effect to impair the obligation of contracts.

The case of *Gelpcke* v. *Dubuque* has been followed in many later cases, notably in the case of *Butz* v. *City of Muscatine*,[1] a case which has, however, been thought to have modified to some extent the former decisions of the court. In that case, the decisions of the State court that a limitation of the power of a city to tax, to one per cent. of the assessed value of the property of the city, forbade the levy of a tax in excess of that limit for the payment of interest on the city's bonds, were held not binding on the United States courts, because such a construction rendered the State law violative of contracts, and on this ground repugnant to the Constitution of the United States.

In the case of *Olcott* v. *The Supervisors*,[2] an act of the legislature of Wisconsin had authorized the people of a county to vote upon the question of aiding a certain railroad company and provided, in case the vote should be in favor of granting aid, that "county orders" should be issued. A vote being taken and resulting in favor of granting aid, county orders were issued and a part of them passed into the hands of Olcott as a *bona-fide* purchaser for value. Subsequently to the issue of these orders, but prior to the trial of the case in the United States Circuit Court for Wisconsin, the Supreme Court of the State held the act to be void on the ground that the object was not a public one for which a tax could be levied.

The United States Supreme Court declined to follow

[1] 8 Wallace, 575. [2] 16 Wallace, 678.

the decision of the Supreme Court of Wisconsin, upon the express ground that the decision of that court was not of the construction of the constitution or statutes of that State, but of a question of general law relating to the nature of taxation and the uses which are public and private, and the extent of legislative powers over such subjects; and upon the further ground that as the contract embodied in the "orders" which were issued under the act in question, was valid under the constitution and laws of the State at the time they were made, no subsequent action by the legislature or the judiciary would be regarded as establishing their invalidity.

"Parties," says the court, "have a right to contract, and they do contract in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule."

This decision does not appear to be in conflict with the other decisions which we have examined, although three justices of the court dissented.

In the case of *Fairfield* v. *County of Gallatin*,[1] the Supreme Court of Illinois, in a number of cases construing the constitution of that State, held that under the constitution of Illinois the issue of bonds for certain purposes, if sanctioned by popular vote under pre-existing laws, was not forbidden. The bonds in question were issued in 1870, and in 1874 the highest court of the State, in the cases referred to, decided that such bonds could be lawfully issued and were not forbidden by the constitution. The United States Supreme Court, in the case of *The Town of Concord* v. *Portsmouth Savings Bank*,[2] in ignorance of this decision of the highest court of Illinois, had construed the constitution of that State as prohibiting the issue of bonds like those in question, by counties or by municipalities, and the question which arose here was whether the court should adhere to its own former decision, or should follow the decision of the State Supreme Court referred to. The court says:

[1] 100 U. S., 47. [2] 92 U. S., 625.

"We are now asked to decline following the construction given and since recognized by the State court, and to adhere to that adopted by us in ignorance of the prior judgment of the State court, and that, not, as in *Rowan* v. *Runnels*, to uphold contracts, but to strike them down, though they were made in accordance with the settled law of the State. We recognize the importance of the rule *stare decisis*. We recognize also the other rule that this court will follow the decisions of State courts giving a construction to their constitutions and laws, and more especially when those decisions have become rules of property in the States, and when contracts must have been made or purchases in reliance upon them. . . . With much more reason may we change our decision construing a State constitution when no rights have been acquired under it, and when it is made to appear that before the decision was made, the highest tribunal of the State had interpreted the constitution differently, when that interpretation within the State fixed a rule of property and has never been abandoned. In such a case, we think it our duty to follow the State courts, and adopt as the true construction that which those courts have declared." pp. 54, 55.

The rule to be drawn from the cases now examined, as well as from numerous other cases which have arisen in the Supreme Court of the United States, seems to be well-settled and defined, and may be thus stated: (1) The statutes of a State and the construction put upon them by the highest court of a State are binding and conclusive upon the courts of the United States in all cases where such statutes so construed are not in conflict with the Constitution of the United States, and where such decisions can be regarded as the settled, fixed, and received, law of the State; (2) but that whenever, in the judgment of the United States courts, State statutes as construed by State courts are in conflict with the Constitution of the United States, or (3) whenever the decisions of the State courts are conflicting, so that any specified decision or decisions of the State courts cannot fairly be regarded as

expressing the settled law of the State, the United States courts are not bound by such statutes or decisions. This rule, with these limitations, seems to be well settled and to have been adhered to with somewhat unusual consistency by the Supreme Court of the United States.

There is a class of cases in which it is specially well settled that the courts of the United States will follow the decisions of the courts of the State, viz.: questions affecting property rights in the several States in which the property in question may be located, and especially in the case of real property.

Thus, in *Polk's Lessee* v. *Wendell*,[1] an action was brought involving the title to land in Tennessee, and although the Supreme Court regarded the decisions of the State courts as of "glaring impolicy," yet it declared:

"The sole object for which jurisdiction of cases between citizens of different States is vested in the courts of the United States, is to secure to all the administration of justice upon the same principles on which it is administered between citizens of the same State. Hence, this court has never hesitated to conform to the settled doctrines of the States on landed property where they are fixed, and can be satisfactorily ascertained; nor would it ever be led to deviate from them in any case that bore the semblance of impartial justice." p. 302.

In *Jackson* v. *Chew*,[2] which involved the construction and validity of a devise of lands in New York, the Supreme Court said:

"The enquiry is very much narrowed by applying the rule which has uniformly governed this court, that where any principle of law, establishing a rule of real property, has been settled in the State courts, the same rule will be applied by this court, that would be applied by the State tribunals. . . . This court adopts the State decisions because they settle the law applicable to the case; and the reasons assigned for this course apply as well to rules of construction growing out

[1] 5 Wheaton, 293. [2] 12 Wheaton, 153.

of the common law as the statute law of the State, when applied to the title of lands. And such a course is indispensable in order to preserve uniformity; otherwise, the peculiar constitution of the judicial tribunals of the States and of the United States, would be productive of the greatest mischief and confusion." pp. 162, 167.

Here again it is seen that the rule applicable in cases involving property rights is subject to the limitation that the State decisions shall have settled the law, and of course, that where the decisions are conflicting, the United States courts will act without reference to State decisions, or will follow those which most commend themselves to its approval.

The case of *Brine* v. *Insurance Company*[1] is among the latest and most strongly emphasized determinations upon this topic. The case was this: a statute of Illinois allowed a mortgagor of real property twelve months to redeem after sale in foreclosure, and to a judgment creditor of the mortgagor, three months additional. The case was ably argued, and the opinion of the court is carefully drawn, and the case, while subjected to some criticism of the profession, both as to its statement of principles and its conclusion, is a high authority as to the law as it now stands. The court in this case remarks that if the laws of a State are not to be followed by Federal courts sitting within the same State, there being no common arbiter, there is at once "introduced into the jurisprudence of Illinois the discordant elements of a substantial right which is protected in one set of courts and denied in the other, with no superior to decide which is right." p. 635.

It may therefore be said that the United States courts, when administering the local law of the different States between parties who are entitled by reason of citizenship

[1] 96 U. S., 627.

to litigate their causes in those courts, are bound by the statutes of the States and by the construction given to those statutes by the courts of the State in which they sit, whenever the decisions of the State court are found to have settled the construction of the statutes or the law of the State; and that this rule applies with special rigidity to cases of real property, or cases affecting real property, or contracts, like mortgages, affecting real property; but that the rule in all cases is subject to the qualification that the statutes and decisions of the State shall violate no right granted or secured by the Constitution of the United States.

There remains a large class of cases which usually fall under the denomination of "general commercial law," in which the courts of the United States do not regard themselves bound to follow, and do not follow, the decisions of the State courts. This class embraces contracts, negotiable securities, and the many questions of common law which arise in commercial and business transactions. In the celebrated and leading case of *Swift* v. *Tyson*[1] this rule was most amply stated and defended by Judge Story, and it has been steadily adhered to in subsequent cases. The case involved the question whether the fact, that the bill of exchange on which the suit was brought had been received in payment of a pre-existing debt, was a good defence. The case was very fully argued, and lacks none of the qualities of an authoritative decision, and was rendered by a court unanimous upon the question now under consideration.

Mr. Justice Story, after stating the facts of the case, says: "The plaintiff is a *bona-fide* holder without notice for what the law deems a good and valuable consideration—that is, for a pre-existing debt, and the only real question in the cause is, whether under the circumstances of the present case, such a pre-existing debt constitutes a valu-

[1] 16 Peters, 1.

able consideration in the sense of the general rule applicable to negotiable instruments." He then states that it is contended that "by the laws of New York as expounded by its courts, a pre-existing debt does not constitute in the sense of the general rule a valuable consideration applicable to negotiable instruments." Examining the decisions of the courts of New York, he finds that "it admits of serious doubt whether any doctrine upon this question can at the present time be treated as finally established." "But," he continues, "admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon this court, if it differs from the principles established, in the general commercial law." After stating that it is contended that the Judiciary Act of 1789, which provides that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply," furnishes a rule obligatory upon the court, Judge Story says:

"In order to maintain the argument it is essential therefor to hold that the word 'laws' in this section includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are at most only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective or ill-founded, or otherwise incorrect. The laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof or long-established local customs having the force of laws. In all the various cases which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of this section limited its application to State laws strictly local, that is to say, to the positive statutes of the State and the construction thereof adopted by the local tribunals,

and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character. It has never been supposed by us that the section did apply or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the State tribunals are called upon to perform the like functions as ourselves—that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case." pp. 18, 19.

The court then proceeds to hold that the section of the Judiciary Act is limited to local statutes and local usages of a fixed and permanent character, and does not extend to contracts and other instruments of a commercial nature, and proceeding to hold that a pre-existing debt does constitute a valuable consideration, decides that the Supreme Court is not bound by the decisions of the State court.

This view of the intent and scope of the section of the Judiciary Act in question is not only authoritative, but seems to be founded upon reason. English commercial law, in the absence of positive regulations or statutes, or, in the language of Judge Story, of usages having a "fixed and permanent operation"' is not of a local nature, but is the result, like the English common law, of the decisions of courts, sometimes enunciating rules of law and sometimes sanctioning customs of a greater or less degree of prevalence and force. It might indeed have been determined that the United States courts should take their law in all respects which concern ordinary business or commercial affairs and transactions from the courts of the States. But it seems perfectly clear that such was not the scheme or intent of the framers of the

judiciary system indicated by the Constitution, or by the great Judiciary Statute of 1789. On the contrary, the purpose appears plainly to have been to vest, by constitution and statute in the courts of the United States, judicial power to protect and enforce all rights granted or secured in any respect by the Constitution of the United States, or by laws passed in conformity to that Constitution ; and in all other cases in which the constitutions or laws of the States or the decisions of the State courts construing State constitutions and laws, have established the law in any respect, but especially with respect to landed property, and where such decisions have settled the law of the State, and where the State constitutions, laws, and decisions comport with the Constitution of the United States, to bind the United States courts, as a matter of legal obligation, to observe the laws of the States and to follow the decisions of the courts of the States. This scheme secures, on the part of the United States, the enforcement and protection of its Constitution and laws through its own courts ; it secures further the complete judicial autonomy and self-government of the States, so far as the States have expressed their will in the form of statutes or of permanent and fixed usages, or of constructions given by their courts to their statutes. But outside of these limits and subjects there is a wide range of matters which are not now regulated in the States by statutes, or by permanent local usages, or by the settled decisions of courts ; and as to all such matters, it was the wise, as well as obvious, purpose of the authors of the judicial system of the United States to leave the State courts to their own independent judgment and action; and to leave the United States courts equally independent in reaching their conclusions.

Other features of the law than that commonly known as general commercial law have been held to fall within the same rule of the independence of Federal courts sitting within the States and deciding cases arising between

citizens of different States. Thus, in the case of *Railroad Company* v. *Lockwood*,[1] a case arising and tried in the State of New York, the Supreme Court of the United States held, contrary to the current and tendency of the New York decisions, that it was against public policy and unlawful for railroad companies carrying passengers for hire, to stipulate not to be answerable for their own or their servants' negligence in reference to such carriage; and in the case of *Tilden* v. *Blair*,[2] a case arising and tried in the same State, the same court held, contrary to the decisions of New York, that a draft dated in Illinois and drawn by a resident of Illinois on a resident of New York, and accepted by the latter, but first negotiated in Illinois, is an Illinois contract, and governed, in a suit by a *bona-fide* holder, by the law of Illinois and not of New York, in respect to the defence of usury.

It is undeniable that some evils have arisen from this mutual independence of the State and Federal courts. It is an anomaly and inconvenience, no doubt, that, within the same territory, in the same State and community, questions of law in cases strictly similar may be and are decided in opposite ways. It is true that the citizen cannot always know or be advised what his legal obligations and rights are, or will be declared to be, until he learns in what courts, State or Federal, they will be adjudicated

It is worthy of remark here that if absolute uniformity of decision is desired by the States, it is within their power by statutes to effect such uniformity. State statutes can fix the law upon any given topic not denied to the States nor committed by the Constitution to the power of the United States. If, for example, the State of New York regards it as important that the law, both in State and Federal courts sitting within her territory, should be that one who receives negotiable paper on account merely of a pre-existing indebtedness, should not stand as a *bona-fide*

[1] 17 Wallace, 357. [2] 21 Wallace, 241.

holder for value where there are defences to the paper, a brief statute will effect the result. State statutes, as construed by State courts, within the limits already noted, are rules of decision in courts of the United States.

It is often urged, however, that the true remedy consists in the Federal courts conforming their decisions in all cases not involving Federal questions to the decisions of the State courts. Let us consider this proposition.

Our dual or compound constitutional system—States and Nation—suggested and required a dual or compound judicial system—State courts and Federal courts. Federal questions naturally were assigned to Federal courts; State questions, or, more accurately speaking, all questions not Federal, were naturally left to the State courts. But to secure the rights of litigating citizens of different States against the possible or apprehended partiality or injustice of the courts of the State which might become the *forum* of adjudication, and as part of the general scheme of the relations of the States to the Union, it was deemed important that controversies arising between citizens of different States should be assigned to the jurisdiction of the courts of the United States. In carrying into effect this scheme, the local laws of the States,—statutes and long-standing usages having the force of law,—were made rules of decision in all United States courts. In the remaining realms of the law to be administered by the latter courts, why should the law as declared by the decisions of State courts be made controlling in the Federal courts? Why, in such cases, should a citizen of Massachusetts, bringing his suit in the Federal courts for New York, be subjected to the law of New York as declared by its courts? And why should not the forum which he is allowed to seek, be also allowed to administer the law in his case according to its own judicial conceptions? If the non-resident citizen must accept the same law, under a Procrustean rule of conformity to State decisions, he can hardly be said to be protected in any rights by his consti-

tutional power to bring his suit in the Federal forum. As respects local statutes and local usages of the States, not conflicting with the Constitution, the degree of State autonomy contemplated by the Constitution would suggest and call for their recognition and enforcement by Federal courts administering the law within the States. But, as respects that part of the law not dependent on State statutes or usages, it is not easy to see why the Federal courts should not be left free to render judgments and follow rules conformable only to their own independent conclusions. If, as I have said, the right of citizens of different States to seek the Federal tribunals is a valuable or essential right, a safeguard both of the rights of individuals and of the peace and harmony of the States of the Union, the power to decide freely in all cases not controlled by positive local statutes or settled local usages, seems essential to the exercise of the jurisdiction of the Federal courts in this class of cases.

In other words, our political system, in its nature and true intent, looks to the supremacy of the Constitution and statutes of the United States as interpreted by the courts of the United States, and to the supremacy of the State constitutions as interpreted by the State courts, wherever the Constitution and statutes of the United States do not apply; while within the domain of law not covered either by the Federal Constitution or statutes, or by the State constitutions or statutes, the two courts shall exercise independently the judicial power belonging to each.[1]

The present result, as we have now examined it, seems to be in harmony with this scheme of our constitutional system, and the evils and inconveniences which arise in the practical working of the system must, in language already quoted, "be set to the account of that imperfection which still marks and mars the administration of all human affairs." It is a fact of every-day observation that a resident of one

[1] *Vide*, on this point, especially, Mr. Webster's argument in *Groves. v. Slaughter*, *supra*, pp. 489–495.

State may have property or commercial interests at the same time in several different States. He may also at the same time have agents making sales, contracts, and collections in several other States. He may thus be subject in his pecuniary interests to many separate jurisdictions and to many discordant decisions of courts and rules of law. While no thoughtful student of our political system will seek to escape these inconveniences by enlarging the domain of the national judiciary, quite as little will he seek to restrict within narrower limits the independence of the Federal courts, which to-day, within the sphere of their constitutional jurisdictions and powers, furnish and apply the only system of domestic law co-extensive with our national boundaries.

We may borrow and adopt on this topic the luminous expressions of an eminent authority:

"A Federal court," says Mr. Justice Matthews, "sitting in a State to enforce rights of action against one of its citizens, is authorized to administer *that law alone which ought to prevail in the courts of the State itself*. . . . Inasmuch as, with some exceptions, the common law of England, brought with them by our ancestors in the settlement of the country, with such modifications as have been introduced by local customs, prevails generally in all the States, and as, happily, the uniformity of that system has been largely preserved by the homogeneous development of the people and their institutions, the differences of judicial decision are mainly differences as to its interpretation. The courts of the United States, thus sitting in every State to adjust and determine controversies between citizens of different States arising mainly under a single system of jurisprudence, acting in harmony with each other, under the correcting and revising power of the supreme appellate tribunal, are well calculated to contribute by the weight of their judicial reason to that unity and certainty of the law which are so important as elements of justice." [1]

No fact connected with our political development since

[1] Address at the Yale Law School, 1888.

1789 seems to me more remarkable than the infrequency of the instances of serious conflict of jurisdiction between the courts of the States and of the United States. No more striking evidence exists of the civil capacity of the American people,—of what Bagehot, in words already quoted, calls "the civil instincts and capacities of our race." The self-restraint, the respect for law, the essential patriotism thus exhibited, are among the highest and noblest civil qualities.

In the decade preceding the Civil War, when the moral indignation of the people was roused by the hideous barbarities and political encroachments of slavery, one case arose which stands in our judicial records as a warning that the strongest constitutional or legal barriers cannot always stand against the settled moral convictions of a people. In the cases of *Ableman* v. *Booth* and *United States* v. *Booth*, Booth had been arrested and held on the charge of aiding the escape of a fugitive slave. While so held by the United States marshal, he was released on a writ of *habeas corpus* by a judge of the Supreme Court of Wisconsin. He was subsequently indicted and convicted upon the same charge, and while undergoing sentence of the United States court, was again released on writ of *habeas corpus* by the Supreme Court of the State. The cases were carried to the Supreme Court of the United States on writ of error, and gave occasion for one of the ablest and most permanently valuable decisions of Chief-Justice Taney.

I suppose no lawyer or statesman of standing would to-day undertake to defend the action or decisions of the court of Wisconsin on legal grounds. Those decisions were indeed without a shadow of support in law, and could never be defended except upon revolutionary grounds. They show impressively the dangers to every part of our political system involved in the protection

[1] 18 Howard, 476, 479.

afforded by the Constitution to that baleful and deadly foe to our national peace as well as to our great constitutional system and experiment,—warranting President Lincoln's brave and sagacious vaticination: "This Government cannot endure permanently half-slave and half-free."

The view which has now been taken, prolonged, as it has been, beyond the ordinary limits of a single discourse, of the relations both in theory and in fact, in a forensic as well as in an historical, aspect, of the State judiciary to our political system, must, I feel sure, awaken some new sense of the profound wisdom of the arrangements and adaptations embodied in our Constitution, and put into operation by the Judiciary Act of 1789. That wisdom lay, be it ever remembered, in following no fascinating theories of natural right and justice, nor brilliant philosophical speculations upon the nature of society and government, but in a profound knowledge and appreciation of the familiar, home-bred, hard-won, slowly-maturing results of the political life and experience of the American people as colonies and as States under the Confederation. The authors of our political and judicial systems wrought with materials furnished by that long, symmetrical, Providential training which, through a century and a half of political dependence, through eight years of war, and ten years of feeble and futile confederation, had schooled them for their sublime task of preserving and perpetuating their local governments through familiar local agencies, and yet binding them all, by indissoluble bonds, into one harmonious Plural Unit. Honored be their memories! Their abounding and unselfish patriotism; their grave and serene trust in their cause; their lofty and invincible faith in human nature; their brave and unshaken confidence in our capacity for self-government; but more than all, except their antique and severe public virtues, their simple reliance on what history and experience had taught them!

There is a feature of our subject to which I should be

glad to turn, if time permitted—I mean the general character of the State Judiciary as a body or succession of individual men. At no time, I think, has the average of judicial fitness and ability represented by the judges of the highest courts of at least our oldest and best-governed States, fallen below the average of like qualities displayed by those occupying the seats of the Federal judiciary. Great names come thronging from the memory as the backward glance is cast over our judicial history. One supreme name there is, to which the annals of our State and national judiciaries furnish no equal; of whom, in the judicial aspect, we may say:

> "Of whose true-fixed and resting quality,
> There is no fellow in the firmament,"—

John Marshall—"that most exquisite picture in all the receding light of the days of the early republic."[1]

But after that name, there are none more illustrious for forensic and judicial learning, or for juridical power and character, than the names of Kent, of Parsons, of Gibson, of Shaw, of Walworth, of Sharswood, and all the long line of State judges whose figures rise unbidden as one looks back. But I must not pause.

The highest achievement of the English-speaking race is, I make no doubt, the subordination of all other powers and authorities to the power and authority of Law,—the enthronement over all, the apotheosis, of that idea and fact which is the nearest approach, the most faithful echo which human ears ever catch, of the voice of God,—not the voice of the people as heard at any given moment, but the voice of incarnated Reason and Truth—of Justice and Authority,—Law:

> "Sovereign law, that state's collected will,
> O'er thrones and globes elate."

In a just relative estimate of the different functions of government as duly distributed in a system worthy the

[1] E. J. PHELPS, Address before American Bar Association, Saratoga, 1879.

name of free or constitutional, I should with deliberation assign an essential superiority to the function which is concerned with the definition, the determination, of *what is the Law*, and the application of what is so declared to the manifold actual affairs of men in society. This is the power which in the last analysis gives law to the law-maker, the law-giver, and the law-executor alike. What is the law, when it is to be concretely applied, is declared by the judicial power both to the legislative and executive powers. A group, at first of six, later of seven, now of nine, elderly lawyers, exercising this power, has moulded, harmonized, and applied the principles and ideas expressed in our national Constitution through the first century of our unexampled growth in national power, social development, and scientific and literary progress. To the mad waves of nullification, insurrection, anarchy, and socialism, it has calmly said: "Hitherto, but no farther!"; and in humbler guise it has brought and is bringing, peace, security, the hope of gain, the reward of labor, for ourselves and our children. In reaching these results—the most precious in the lives of men as social beings—let us be assured that it is not our national judiciary, alone or chiefly, that has been and must hereafter be our hope and confidence. Over the greater part of our lives, our rights, our highest interests, stretches the arm of State power. There, there, we most live and move, and have our being. "There we have garnered up our hearts—there we must either live or bear no life."

It is time my last word was spoken. The theory of our governments, State and national, is "opposed to the deposit of unlimited power anywhere." Not only may no person say, but no power, department, or function, of government, may say, here and now: "*L'État, c'est moi.*" Let me give you a word from one of the noblest opinions of the Supreme Court:

"It must be conceded that there are rights in every free

government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens, subject to the absolute disposition and unlimited control of even the most democratic depositary of power, is after all but a despotism." [1]

The old-time omnipotence of the English sovereign, succeeded in our day by the omnipotence of the English Parliament, has no place in our political system, no analogue in our political vocabulary.

The most imposing fabric of political power the world has ever seen—a power whose name and memory still thrill the imagination—inspired the patriotic Roman to sing:

> "Blest and thrice blest the Roman
> Who sees Rome's brightest day;
> Who sees that long victorious pomp
> Wind down the Sacred Way,
> And through the bellowing Forum,
> And round the Suppliant's grove,
> Up to the everlasting gates
> Of Capitolian Jove."

The fabric of Roman political power was long ago broken in pieces; and I know not how much of the wisdom of to-day will be the folly of to-morrow; but sure I am, that if our system of government shall outlast those that have gone before it, it will be because, founded at first on experience and buttressed by law, we and our descendants shall preserve, clear and high, its original great ideas and circumscriptions. Faithful in this, the poet's apostrophe and prophecy may have warrant:

> "Thy sun is risen and shall not set
> Upon thy day divine;
> Ages of unborn ages yet,
> America, are thine!" [2]

[1] Mr. Justice S. F. Miller, in *Loan Association* vs. *City of Topeka*, 20 Wallace, 655.

[2] F. Marion Crawford, "New National Hymn," 1887.

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